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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES M. DARTEZ, RICHARD C. SMITH, SR., WILLIAM B. HARDY, CECIL OVERSTREET and JOHN D. BURKE,
Petitioners,

v.

OWENS-ILLINOIS, INC and FIBREBOARD CORPORATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should this Court permit the Fifth Circuit Court of Appeals to:

1. Judicially amend Rule 801(d)(2) of the Federal Rules of Evidence through reliance upon common-law doctrines that predate and have no basis in the Federal Rules of Evidence, and then
2. Rely upon common-law doctrines to avoid correcting the error.

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OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Texas, dated June 2, 1989, is unreported, and is reprinted as Appendix A, at page 1a. The

decision of the United States Court of Appeals for the Fifth Circuit reversing the district court's judgment for respondents is dated September 11, 1990, is reported at 910 F.2d 1291, and is reprinted as Appendix B, at page 4a. The first opinion on the point in question is dated August 9, 1988, is reported at 851 F.2d 742, and is reprinted as Appendix C, at page 15a. The Petition for Rehearing and Suggestion for Rehearing En Banc was overruled November 14, 1991, and is reprinted as Appendix D, at page 29a.

JURISDICTION

The decision of the court of appeals was announced on September 11, 1990, and the motion for rehearing was denied November 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Rules of Evidence were enacted by Congress as a statute in 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975), 28 U.S.C. App. (1988). The relevant portion of Rule 801 provides:

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> **(d) Statements which are not hearsay.** A statement is not hearsay if --
>
> (1).....
>
> **(2) Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The Fifth Amendment of United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

> offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

This case focuses upon a fundamental, recurring issue: the modification of the Federal Rules of Evidence by resorting to common-law doctrines.

1. **Background**

On March 27, 1989, the district court called these cases to trial. It was the third trial for Mr. Dartez and the second trial for Messrs. Hardy, Smith, Overstreet, and Burke. The plaintiffs sought recovery for asbestos-related diseases. Plaintiffs had listed as exhibits, and intended to offer as admissions, prior pleadings and briefs of defendants. The exhibits fell into two general groups. The first group were admissions by defendants concerning the date when the dangers of asbestos were known. The second group concerned defendants' admissions concerning the effects of asbestos upon the human body. After a half-day's evidence on liability issues, defendants agreed to waive their "state of the art" defense and plaintiffs waived their claims of punitive damages. The cases continued on three issues: product exposure, producing cause of asbestos-related diseases, and compensatory damages.

Focusing primarily on compensatory damages, plaintiffs offered Exhibits 46 and 47. These exhibits were

excerpts[1] from post-trial briefs filed in separate declaratory judgment actions in California by two of the defendants, Fibreboard Corporation and Armstrong World Industries, Inc., and other major asbestos manufacturers/sellers. The California litigation was initiated by the manufacturers against their insurance companies to secure insurance coverage indemnifying them for the underlying personal injury claims, such as the ones before this Court, as well as for the cost of defending those claims. Billions of dollars of insurance coverage were at stake.

The manufacturers' claims, in contract, rested upon many of the same medical facts and opinions that supported plaintiffs' cases in tort. The post-trial briefs summarized the medical evidence that supported the manufacturers' right to recovery. Relevant excerpts from these post-trial briefs were offered in the district court as admissions under Rule 801(d)(2).

The excerpts tended to prove several medical facts important to plaintiffs' cases. First, they tended to show that asbestos-related diseases begin immediately upon inhalation of asbestos, are progressive even in the absence of added exposure, are untreatable and incurable, and that the medical tools for diagnosing these diseases are relatively crude. These facts were hotly contested in the trial court. Next, the excerpts tended to prove that an adult could lose one-third to one-half of the functioning portion of the lung before experiencing any noticeable symptoms or presenting

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[1]The complete text from which the excerpts were taken was tendered for record purposes in the trial court and was available for use if the defendants chose to offer any clarifying evidence. No such evidence was offered.

clinically measurable signs. Last, the evidence tended to impeach the position taken by defendants in the trial court.

The exhibits which were offered pertained only to Fibreboard Corporation and Armstrong World Industries, Inc. The district court admitted the evidence over hearsay objections. After judgment was entered for plaintiffs, Armstrong World Industries, Inc., one of the participants in the California litigation, paid its pro-rata portion of the judgment and is not before the Court on this appeal.

The evidence in question was relevant and probative. In concluding that the admission of the evidence was harmful, the court of appeals noted that "[p]laintiffs' case rested largely on the future potential worsening of their medical conditions" and that offering "[t]hese 'admissions' appeared both to support plaintiffs' contentions that their conditions were going to worsen and to contradict the manufacturers' defense that these plaintiffs were unlikely to contract the diseases in issue." 13a-14a.

2. The Appeals

These plaintiffs have been before the Fifth Circuit Court of Appeals on two occasions on appeals from favorable judgments for plaintiffs.[2] The first appeal was *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742 (5th Cir. 1988). After retrial following the *Hardy* decision, defendants again appealed. *Dartez v. Owens-Illinois, Inc.*, 910 F.2d 1291 (5th Cir. 1990).

In *Hardy* plaintiffs had offered as admissions excerpts from appellate briefs filed in other courts by Raymark Industries, Inc. and Keene Corporation. This evidence was

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[2]Mr. Dartez has actually been involved in three appeals. The first, on other grounds, was Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985).

also from declaratory judgment actions filed to secure insurance coverage, and was of the same tenor as the disputed evidence in this appeal. The difference in the evidence was the venue in which the statements were originally offered. In *Hardy* the statements were made in appellate briefs. In *Dartez* the statements were made in briefs filed at the trial court level.

The court of appeals reversed *Hardy* concluding that, absent some highly unusual circumstances, statements in appellate briefs are not properly regarded as party admissions. The Panel's conclusion was premised upon the assumption that absent "highly unusual circumstances," admissions under Rule 801(d)(2) were limited to "facts," "historical facts," or "real world facts." 23a. Concern was expressed that uncertainty and jury confusion could result from permitting the use of record facts as substantive evidence. 23a In reaching its conclusion, the Panel relied upon a 1969 district court case, *Taylor v. Allis-Chalmers Mfg.*, 320 F. Supp. 1381, 1384-85 (E.D. Pa. 1969) 24a, and a 1971 Fifth Circuit case, *Continental Ins. Co. of New York v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971) 22-23a. Both cases were decided prior to the enactment of the Federal Rules of Evidence in 1975.

In deciding and reversing *Dartez*, the court of appeals relied upon its prior decision in *Hardy* that statements in appellate briefs were not admissions under Rule 801(d)(2), and concluded that statements in trial level briefs were not admissions either, because they were summaries of evidence adduced at trial, prepared by attorneys for the manufacturers. 11a. Again relying on the 1969 district court opinion in *Taylor*, *id*, the court of appeals concluded that post-trial briefs were not a "pleading" and could not qualify as an admission. 12a.

In reversing *Dartez*, the court of appeals refused to

consider plaintiffs' contention that *Hardy* constituted an impermissible amendment of Rule 801(d)(2). The authority cited was the law of the case doctrine and the rule that one panel cannot overrule an earlier decision of another panel. 11a. It is from *Dartez* that plaintiffs seek writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals has judicially amended a statute by grafting common-law exceptions onto the Federal Rules of Evidence and then avoided correcting the error by resorting to common-law doctrines. This judicial procedure disregards prior rulings of the Supreme Court, frustrates Congressional policy, and denies plaintiffs due process of law.

The Supreme Court has instructed lower federal courts that the Federal Rules of Evidence are statutory laws and that "traditional tools" should be used in construing them. The beginning point in construing a rule, as with any statute, is with the language of the rule itself. *Beech Aircraft v. Rainey*, 488 U.S. 153, 163 (1988); *see also United States v. Rogers*, 918 F.2d 207, 209 (D.C. Cir. 1990)(per Thomas, J.). The Rules are statutory; not a body of procedural law promulgated by judges. Courts are to follow a "plain meaning" approach to the Rules of Evidence.

Because of long-standing, common-law traditions and practice, the appellate courts have been reluctant to heed the Supreme Court's instructions that the Federal Rules of Evidence, being statutory, must be enforced according to their plain meaning.

The Fifth Circuit Court of Appeals has been active in judicially amending the Federal Rules of Evidence. Recently, in *Christophersen v. Allied-Signal*, 939 F.2d 1106 (5th Cir. 1991), *petition for cert. filed*, November 12, 1991,

the Fifth Circuit issued an *en banc* decision construing Fed. R. Evid. 702. *Christophersen* was analyzed in a recent legal publication,[3] in which the authors noted, "[i]n a unique approach, the Court merged *Frye* with the FRE, adding an additional requirement for expert witnesses not otherwise found in the FRE." The bench and bar are recognizing that the Fifth Circuit is judicially amending the Federal Rules of Evidence when it has no power to do so.

This judicial procedure is seductive and potentially far-reaching, but it is legally impermissible. As Article III courts, the lower federal courts have no power to judicially amend the Federal Rules of Evidence. That is a power reserved to Congress and the Supreme Court.

As regards this appeal, the Fifth Circuit Court of Appeals has violated Rules 102, 402, and 801 of the Federal Rules of Evidence, disregarded this Court's directives on Rules construction, and has launched a precedent that undermines Congressional policy.

Despite clear instructions from this Court, the Fifth Circuit has donned an unauthorized legislative mantle in interpreting the Federal Rules of Evidence that threatens to undermine Congressional policy. Common-law exceptions have been grafted onto a clear statute. The lower court has deviated from its task of enforcing the law and has assumed for itself the role of amending Rule 801(d)(2). Because the Fifth Circuit is an influential circuit, its erroneous decisions may be perpetuated by other circuits. For example, the *Hardy* decision exceptions have already begun to be quoted

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[3]S. Allinger & C. Bailey, *High Noon at the Fifth Circuit Corall:(sic) "Battle of the Experts" Meets "Junk Science"--Christophersen v. Allied-Signal Corp.*, Hous. Law., Jan.-Feb. 1992, at 10.

with approval. Because of *Hardy*, and similar decisions of the courts of appeal, thousands of litigants are being denied due process of law.

Unless this Court acts now, the "judicial amendment" trend has the potential to create and disseminate great injustice.

I. BECAUSE THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN *HARDY*, AND JUDICIALLY AMENDED THE FEDERAL RULES OF EVIDENCE, THE JUDGMENT IN *HARDY* IS VOID AND MAY BE ATTACKED COLLATERALLY.

A proper resolution of this appeal involves examination of the common-law doctrine of "law of the case," rules construction, Congressional policy, and the common-law limitations of *Hardy*. Proper disposition of this inquiry will affect tens of thousands of cases in the judicial system.

A. The Law of the Case Doctrine

The Fifth Circuit refused to consider plaintiffs' point that *Hardy* constituted an impermissible amendment of Rule 801(d)(2), citing the law of the case doctrine and the rule that one panel of the court could not overrule an earlier decision of another panel. 11a. The law of the case doctrine, however, has exceptions. If the prior decision was clearly erroneous and would work a manifest injustice or if controlling authority has since made a contrary decision, the doctrine does not apply. *Schexnider v. McDermott Int'l, Inc.*, 868 F.2d 717, 718-19 (5th Cir. 1989). Plaintiffs will establish that the *Hardy* decision was clearly erroneous and would work a manifest injustice. Both prior to and since *Hardy*, the Supreme Court has held that the Rules must be assigned their plain meaning. The lower courts are without power to graft common-law doctrines onto the Rules.

Because the Fifth Circuit's judgment in *Hardy* was in excess of its power, the judgment is void and can be attacked collaterally. *Felhaber v. Felhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982), *cert. denied*, 464 U.S. 818; *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949).

Manifest injustice results when a party is denied his judgment because a court fails or refuses to enforce a rule of evidence as "plainly written." Because of *Hardy*, five plaintiffs have been denied judgments in their favor on two occasions. The injustice, however, is not limited to these five plaintiffs. There are tens of thousands of asbestos-related injury cases pending in federal courts nationwide that would benefit from the evidence that the defendants have admitted, that is relevant and probative, that the Fifth Circuit has recognized, and which, because of usurpation of judicial power, has been excluded. Exclusion of this powerful evidence will needlessly consume inordinate amounts of already limited judicial time and expense. The common-law doctrine of law of the case should not be invoked to perpetuate a clearly erroneous decision that has the potential to foment injustice in thousands of cases.

B. Rules Construction

1. The Plain Meaning Standard

In a series of cases, the Supreme Court has instructed the lower courts that the Federal Rules of Evidence are to be construed and enforced according to the plain meaning of the Rule. In *Bourjaily v. United States*, 483 U.S. 171, 178-79 (1987), *Huddleston v. United States*, 485 U.S. 681, 687-88 (1988), and *United States v. Owens*, 484 U.S. 554, 561-62 (1988), this Court "applied the plain meaning standard to the

Federal Rules of Evidence".[4]

2. By Definition, Under Rule 801(d)(2), The Evidence Was Not Hearsay

The evidence was offered in the trial court as admissions under Rule 810(d)(2), and the offer was properly limited to the defendants making the assertions. All defendants objected that the evidence was hearsay. The Fifth Circuit concluded that the assertions were hearsay because they were made in trial level briefs.

In *Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987), this Court instructed the federal courts that "a court must be satisfied that the statement actually falls within the definition of the Rule" before admitting evidence under Rule 801(d)(2).[5] If the evidence falls within the definition of Rule 801, Congress has declared that it is not hearsay.

The statements offered in evidence fell squarely within each of alternative subdivisions (A), (B), (C), and (D) of Rule 801(d)(2). The fact that the evidence qualifies under four of the five subsections demonstrates the deviation from established rules construction law. The subsections are listed alternatively. The evidence does not have to fit all.

The briefs were filed in the California trial court on behalf of Fibreboard and other manufacturers by their attorneys which satisfies subdivision A (statements in a representative capacity). The briefs were offered to the trial court to persuade the court to render a multi-billion dollar

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[4]Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 Tex. L. Rev. 745 (1990).

[5]The Court was construing Rule 801(d)(2)(E) in *Bourjaily*.

judgment for the movants, which satisfies subdivision B (manifestation of a belief in the truth of the statements). The briefs were submitted to the California court by the manufacturers' attorneys, which satisfies subdivisions C (statements made by a person authorized to make the statement concerning the subject) and D (statements by a party's agent concerning a matter within the scope of the agency or employment during the course of the relationship).

In *Dartez*, the court of appeals conceded that the evidence was relevant and probative. In concluding that the admission of the evidence was harmful, the court of appeals noted that "[p]laintiffs' case rested largely on the future potential worsening of their medical conditions" and that offering "[t]hese 'admissions' appeared both to support plaintiffs' contentions that their conditions were going to worsen and to contradict the manufacturers' defense that these plaintiffs were unlikely to contract the diseases in issue." 13-14a. Under the plain wording of the Rules the evidence was not hearsay. The Fifth Circuit's ruling that relevant, probative evidence was not an admission because it appeared in a brief constitutes a judicial imitation on Rule 801(d)(2) that cannot be found in the Rule.

C. The Common-law Limitations of *Hardy*

In *Hardy* the Fifth Circuit considered whether assertions in appellate briefs could be admissions under Rule 801(d)(2). Rather than look to the plain meaning of the Rule, the Fifth Circuit engaged in semantic differences between "pleadings" and "briefs." By citing pre-Rules decisions, it noted that trial court pleadings generally constitute statements of certain historical facts in the real world. Assertions in appellate briefs, however, may not be statements of what the real world facts are because briefs are limited to record facts. 23a The court therefore concluded that "absent some highly unusual circumstances not present

here, [statements in] such briefs are not properly regarded as party admissions. *Cf. Taylor v. Allis-Chalmers Manufacturing Co.*, 320 F.Supp. 1381, 1384-85 (E.D. Pa. 1969)." 24a.

Rule 801(d)(2) does not exclude assertions in pleadings, briefs, correspondence, or those made in connection with any other judicial activity. Nor is there any requirement for "highly unusual circumstances" to exist before an assertion under Rule 801 constitutes an admission.

In reaching its conclusion in *Hardy*, the court of appeals did not consider whether the evidence fell within the plain meaning of the Rule. Nor did it consider that Rule 801(d)(2) is not limited to "facts," "record facts," "real world facts," or "highly unusual circumstances." Nor does the Rule exclude assertions depending upon the place the assertion appears. To satisfy the Rule, all that is required is an assertion in an individual or representative capacity. The assertion may be oral or written, or, it can be nonverbal conduct if it is intended as an assertion.

The Fifth Circuit erroneously pulled the exceptions from pre-Rules case law; from 1969 in *Taylor*, and from 1971 in *Continental Ins. Co. of New York v. Sherman*, 439 F.2d 1294 (5th Cir. 1971). Because of the separation of powers in the federal government, the court cannot use common law to amend statutory law; it cannot amend statutory law. It must enforce the statute as "plainly written." In assuming that statutory law could be modified by common-law doctrine, the court of appeals' reasoning was flawed. The Fifth Circuit's flawed reasoning is being adopted by other circuits, and has the potential to deny justice to present and future litigants. Supreme Court decisions and Congressional policy are being undermined. It threatens to continue unless addressed by this Court now.

D. Congressional Policy

Uniformity in federal court evidentiary standards was a basic objective of Congress in enacting the Federal Rules of Evidence. The Senate Report accompanying the bill that became the Federal Rules of Evidence cited the need for "a comprehensive code of evidence intended to govern the admissibility of proof in all trials before the Federal courts because of the lack of uniformity and clarity in the present law of evidence on the Federal level." S. Rep. No. 1277, 93d Cong., 2d Sess. _____, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7054. Rule 402 is "'the keystone to the whole scheme,'" designed both "to sweep away all pre-existing rules of exclusion" and "to modify this sweeping repeal by stating the relationship between the repealer and the pre-existing law as well as making clear that the rest of the Evidence Rules are exceptions to the basic rule of relevance." 22 C. Wright & K. Graham, *Federal Practice and Procedure* §5192, at 177 (1978).[6]

A second core Congressional policy choice was expressed in the clear meaning of Fed. R. Evid. 402 that all relevant evidence "is admissible, except as otherwise provided [1] by the Constitution of the United States, [2] by Act of Congress, [3] by these rules or [4] by other rules prescribed by the Supreme Court pursuant to statutory authority."

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[6]Had Congress intended to permit common law exceptions to Rule 402, it knew how to do so. For example, Congress expressly permitted common-law development in connection with Rule 501, the privilege rule. It failed to do so with respect to other areas of the Rules, and there is no basis for implying such an intent where Congress was explicit elsewhere.

Relevant evidence may be excluded only if it fits within the four categories enumerated by Congress, and common-law exceptions are not listed in the categories of exclusions. By resorting to common-law notions to construe Rule 801(d)(2), the court of appeals frustrated Congressional policy in both *Hardy* and *Dartez*.

In the trial court, the defendants had objected that the evidence was hearsay. Rather than look to Rule 801 and this Court's prior pronouncements, the court of appeals, in *Hardy*, looked to a 1969 district court opinion for guidance. The first exception was created. In *Hardy*, the court found that if the opponent's assertion is in an appellate brief, it cannot be an admission because "[a]ppellate briefs may not properly purport to be statements of what the real world facts are, but must be statements of what the trial court record reflects." 23a. A condition of trustworthiness was grafted onto Rule 801(d)(2) that is not to be found in the Rule or in the Advisory Committee Notes. To the contrary, the Advisory Committee, in discussing admissions, stated, "[n]o guarantee of trustworthiness is required in the case of an admission." In one broad assertion, the court of appeals judicially amended Rule 801(d)(2) to require that admissions be "facts," "real world facts", or "historical facts" and tacitly suggested a trustworthiness test for any assertions offered.

The inherent suspicion about what lawyers say in pleadings or briefs has been picked up by other circuits. In *Kassel v. Gannett Co.*, 875 F.2d 935, 952 n.17 (1st Cir. 1989), the First Circuit referred to *Hardy*. While admitting the admissions from a brief, the court noted that the case presented "the sort of highly unusual circumstances" imposed by *Hardy*. No mention was made of the fact that Rule 801(d)(2) does not require "highly unusual circumstances."

In *Vincent v. Louis Marx & Co.*, 874 F.2d 36, 40 (1st Cir. 1989), the First Circuit was concerned about the

interaction of Fed. R. Civ. P. 36(b) with Rule 801(d)(2). Rule 36 permits requests for admissions of matters permitted under Fed. R. Civ. P. 26(b). The admissions are for purposes of the pending action only. Rule 801(d)(2) is not so limited. To limit admissions under Rule 801(d)(2) to the proceeding to which it pertains would be to rewrite the Rule. Also, only subdivision B of Rule 801(d)(2) is limited to "belief in its truth."

Recognizing the "uncertain state of the law on the admissibility of prior inconsistent pleadings," in *Vincent*, *id* at page 41, the First Circuit resorted to a balancing test under Rule 403. Approval was given to permit a general rule to prevail over a specific rule, but that is not permitted to the lower courts either. Rule 403 is a general rule and Rule 801 is a specific rule. In a conflict between a specific rule and a general rule, the specific rule prevails. *Green v. Bock Laundry Mach. Co.*, 109 S.Ct. 1981, 1992 (1989).

By permitting a general rule to prevail over a specific rule, the lower courts have judicially created another exception. That has the potential for creating great leeway for lower courts to apply or not apply Rule 801 regardless of the plain meaning of the Rule. Different judges could conclude that relevant evidence might, or might not, create "unfair prejudice," "confusion of the issues," "mislead the jury," or present cumulative evidence. Uniformity is not likely to result when each judge is permitted to interpret the Rule according to his or her particular proclivities at the time. Congressional intent is being, and will be, frustrated.

In *Sanford v. Johns-Manville Sales Corp.*, 923 F.2d 1142, 1147-48 (5th Cir. 1991), the plaintiffs contended they were forced to prove secondarily what defendants had previously admitted. The Fifth Circuit, faced with the same evidence as in this case, upheld exclusion of the evidence because it was cumulative. Cumulative evidence, though,

presumes that other equally significant evidence is before the jury for evaluation, and that it would be a waste of judicial time to load the record with the same evidence. Evidence obtained from expert witnesses, however, in the typical "swearing match" between experts, does not have the same significance to a jury as does the fact that a litigant has admitted in another court the precise evidence it is presently contesting. In *Sanford*, the Fifth Circuit failed to point out that there was no other evidence in the record that defendants had admitted what they were then contesting. As a result, the jury was not permitted to know that defendants had admitted in another equal tribunal the very facts they were disputing in the trial court. That was another fact that the jury needed to appraise because "[t]he vindication of legal rights--depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). Plaintiffs were denied the use of impeachment evidence if not original evidence.

The progressive, cumulative nature of asbestos-related diseases has been recognized by the Fifth Circuit on at least two occasions in *Borel v. Fibreboard Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), and *Porter v. American Optical Corp.*, 641 F.2d 1128, 1133 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981). In fact, Fibreboard, and other manufacturers/sellers, quoted and relied upon the *Borel* and *Porter* cases to reinforce their position in the California litigation.[7]

Exclusion of the evidence means that the same facts must be re-litigated time and again via expert witnesses. By being allowed to contest, without explanation, the very

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[7]Plaintiffs' record excerpts, tab 2, pp. 72-73.

evidence they have admitted, Defendants are permitted to create hypothetical fact situations as they see fit. The reason to prohibit such conduct was explained in *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984):

> To hold otherwise would not only invite abuse and sharp practice, but would also weaken confidence in the justice system itself by denying the function of trials as truth-seeking proceedings ... That function cannot be affirmed if parties are free, wholly without explanation, to make fundamental changes in the version of facts within their personal knowledge between trials and to conceal these changes from the trier of fact ... A party thus cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories.

Litigation of hypothetical fact situations in the asbestos litigation has bogged down the federal court system to such an extent that the very administration of justice is threatened. 37a. Chief Justice Rehnquist has commented:

> The committee has concluded that the situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively.

37a. The courts are overwhelmed. Victims die without compensation before their cases can be tried. Courts become

frustrated having to listen to the same evidence time and time again. Basic due process is denied to thousands of asbestosis victims. The Constitutional right of trial by jury becomes meaningless.

In short, the Congressional objective of uniformity in evidentiary rulings is being frustrated. Unless this Court gives guidance now, the confusion and frustration will grow worse.

II. THE FIFTH CIRCUIT'S DECISIONS IN *HARDY* AND *DARTEZ* VIOLATE PLAINTIFFS' RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT

Congress has declared its policy in Fed. R. Evid. 102, to-wit:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

The Judicial Panel on Multidistrict Litigation has tacitly recognized some of the core problems. In ordering the asbestos cases consolidated for multi-district litigation, the Panel stated:

> It is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning the 1970s...
>
> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts

> continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

38a. Although the courts recognize that the dangers of asbestos were known in the 1930s and the medical aspects of the diseases are uncontested (except at trial), plaintiffs are required to continue to prove these same facts over and over. Expert witnesses contest with one another and the jury is left to guess which is right. The expense and delay is occasioned because the parties are litigating hypothetical fact situations that are limited only by the imagination.

According to the Multidistrict Order, there are 26,639 cases pending in 87 federal districts. 32a. Requiring the plaintiffs to re-litigate time and again core medical facts that defendants have admitted strains the judicial system beyond its capacity. Fed. R. Evid. 102 becomes meaningless. Truth is not being justly determined, expenses mount, and delay has become common. The courts cannot handle the load, victims grow old or die before their cases can be heard, and witnesses die or cannot be located. The Constitutional right of trial by jury becomes meaningless. Fundamental fairness requires that all litigants have the full benefit of the Federal Rules of Evidence and that **all** federal courts enforce the Rules uniformly and according to their plain meaning.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). "'[D]ue process is flexible and calls for such procedural protections as the

particular situation demands.'" *Id.* at 333. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' (citations omitted)." *Id.* at 333.

Rule 402 states the broad policy of the Federal Rules of Evidence -- expansive admissibility -- and itemizes the only permissible grounds for excluding evidence. Common-law exceptions are not among them. Congress has thus stripped the federal courts of authority to customize admissibility limits like those imposed below.

In both *Hardy* and *Dartez*, plaintiffs offered crucial, original, and impeaching medical evidence that fell squarely within the "plain meaning" of Rule 801(d)(2). That should have ended the matter. There was no room for customizing limitations as the Fifth Circuit did in *Hardy* and in *Dartez*. This usurpation of power alone denied plaintiffs a meaningful hearing. The court of appeals, in *Hardy* and in *Dartez*, grafted exceptions onto Rule 801(d)(2) despite its lack of power to do so.

As Article III courts, federal courts are courts of limited jurisdiction. *Ins. Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 701-702 (1982). Action in excess of its jurisdiction is "an unconstitutional assumption of powers ... which no lapse of time or respectable array of opinion should make [a court] hesitate to correct." *Erie R.R. v. Tompkins*, 304 U.S. 64, 70-80 (1938). There is a presumption that every federal court is without jurisdiction unless the contrary appears affirmatively from the record. *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986).

Under the Rules Enabling Act, 28 U.S.C. §§2072-2074 (amend. 1988), the power to alter or amend the Federal Rules of Evidence is vested in the Supreme Court. The lower federal courts' power is limited to enforcing the Rules

and may not amend them under the guise of construing them. *Diggs v. Lyons*, 741 F.2d 577, 582 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985). "A court does not have the power, by judicial fiat, to extend its jurisdiction of matters beyond the scope of the authority granted to it by its creators." *Stoll v. Gottlieb*, 305 U.S. 165 (1938). Exercise of the considerable powers of the court of appeals "'is invalid if it conflicts with constitutional or statutory provisions.' *Thomas v. Arn*, 474 U.S. 140, 148; 106 S. Ct. 466, 471-472 (1985). To allow otherwise 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.' *United States v. Payner*, 447 U.S. 727, 737; 100 S. Ct. 2439, 2447; 65 L. Ed. 2d 468 (1980)." *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369, 2373 (1988) (construing the Federal Rules of Criminal Procedure).

When the Fifth Circuit Court of Appeals, in *Dartez*, was squarely faced with its error of judicially amending statutory law, the Court avoided correcting the error by resorting to the common-law doctrine of "law of the case" and the "rule" that one panel of the court could not overrule a prior decision of another panel. These doctrines do tend to add uniformity and consistency to the law, but uniformity and consistency are no justification to perpetuate an incorrect rule of law. No matter how reasonable the Fifth Circuit's interpretation of Rule 801(d) might appear, the analysis is moot. The interpretation is extra-jurisdictional.

Collectively, plaintiffs have had ten jury verdicts and ten judgments taken away from them because the court of appeals rewrote Rule 801(d)(2) when it had no authority to do so. Plaintiffs are denied a meaningful hearing if the court of appeals is at liberty to (1) graft exceptions onto the rules when it have no authority to do so, or (2) apply or not apply the Federal Rules of Evidence as written. This unauthorized

assumption of power is likely to influence litigation nationwide; it has already begun to spread to other circuits.

Waiting another term or longer would serve no useful purpose. Acting now could prevent massive and wasteful litigation and ensure proper judicial treatment of thousands of cases.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION
(CONSOLIDATED CASES)

JAMES M. DARTEZ
v. CIVIL ACTION NO. B-81-227
OWENS ILLINOIS,
INC., ET AL

RICHARD C. SMITH,SR.
v. CIVIL ACTION NO. B-81-543
OWENS ILLINOIS,
INC., ET AL

WILLIAM B. HARDY
v. CIVIL ACTION NO. B-81-753
OWENS ILLINOIS,
INC., ET AL

CECIL OVERSTREET
v. CIVIL ACTION NO. B-81-759
OWENS ILLINOIS,
INC., ET AL

JOHN D. BURKE
v. CIVIL ACTION NO. B-81-920
OWENS ILLINOIS
INC., ET AL

AMENDED FINAL JUDGMENT

From March 27, 1989, through March 30, 1989, this case was tried before a Jury. The Jury returned a verdict in favor of each Plaintiff. The Court having denied Defendants' motion for new trial and ordered a remittitur, it is

ORDERED, ADJUDGED AND DECREED that Plaintiff, JAMES DARTEZ, recover from Defendants, Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., and Pittsburgh Corning Corporation, jointly and severally, the sum of $535,687.80 as actual damages; said amount includes credits for all settlements to date of judgment and all accrued interest for all sums to which pre-judgment interest is authorized to date of judgment. Plaintiff, JAMES DARTEZ, shall take nothing of and from the Defendant Armstrong World Industries, Inc.; it is further,

ORDERED, ADJUDGED AND DECREED that Plaintiff, CECIL OVERSTREET, recover from Defendants, Armstrong World Industries, Inc., Celotex Corporation, Eagle-Picher Industries, Inc., Fibreboard Corporation, Keene Corporation, Owens-Illinois, Inc., and Pittsburgh Corning Corporation, jointly and severally, the sum of $704,023.61 as actual damages; said amount includes credits for all settlements to date of judgment and all accrued interest for all sums to which pre-judgment interest is authorized to date of judgment; it is further,

ORDERED, ADJUDGED and DECREED that Plaintiff, WILLIAM B. HARDY, JR., recover from Defendants, Armstrong World Industries,Inc., Celotex Corporation, Eagle-Picher Industries, Inc., Fibreboard Corporation, Owens-Illinois, Inc., and Pittsburgh Corning Corporation, jointly and severally, the sum of $679,750.98 as actual damages; said amount includes credits for all settlements to date of judgment and all accrued interest for

all sums to which pre-judgment interest is authorized to date of judgment; it is further,

ORDERED, ADJUDGED and DECREED that Plaintiff, JOHN DAVID BURKE, SR., recover from Defendants, Armstrong World Industries, Inc., Celotex Corporation, Eagle-Picher Industries, Inc., Fibreboard Corporation, Owens-Illinois, Inc., and Pittsburgh Corning Corporation, jointly and severally, the sum of $596,546.95 as actual damages; said amount includes credits for all settlements to date of judgment and all accrued interest for all sums to which pre-judgment interest is authorized to date of judgment; it is further,

ORDERED, ADJUDGED and DECREED that Plaintiff, RICHARD C. SMITH, SR., recover from Defendants, Armstrong World Industries, Inc., Celotex Corporation, Eagle-Picher Industries, Inc., Owens-Illinois, Inc., and Pittsburgh Corning Corporation, jointly and severally, the sum of $577,846.38 as actual damages; said amount includes credits for all settlements to date of judgment and all accrued interest for all sums to which pre-judgment interest is authorized to date of judgment. Plaintiff, RICHARD C. SMITH, SR., shall take nothing of and from the Defendants, Keene Corporation and Fibreboard Corporation. It is further,

ORDERED, ADJUDGED and DECREED that each Plaintiff shall recover from the respective Defendants, listed above, jointly and severally, post judgment interest on this judgment at the rate of ten (10%) percent. Costs of Court are assessed against the Defendants. All relief not expressly granted is denied.

SIGNED at Beaumont, Texas, this 2 day of June, 1989.

APPENDIX B

DARTEZ v. OWENS-ILLINOIS, INC.
Cite as 910 F.2d 1291 (5th Cir.1990)

JAMES M. DARTEZ, Plaintiff-Appellee,
v.
OWENS ILLINOIS, INC., et al.,
Defendants-Appellants.

RICHARD C. SMITH, SR.,
Plaintiff-Appellee,
v.
OWENS-ILLINOIS, INC., et al.,
Defendants-Appellants.

WILLIAM B. HARDY, Plaintiff-Appellee,
v.
OWENS-ILLINOIS, INC., et al.,
Defendants-Appellants.

CECIL OVERSTREET, Plaintiff-Appellee,
v.
OWENS-ILLINOIS, INC., et al.,
Defendants-Appellants.

JOHN D. BURKE, Plaintiff-Appellee,
v.
OWENS-ILLINOIS, INC., et al.
Defendants-Appellants.
No. 89-2646.
United States Court of Appeals,
Fifth Circuit.
Sept. 11, 1990.

Plaintiffs sued to recover for personal injuries they had allegedly sustained as a result of their exposure to manufacturers' asbestos products. The United States District Court for the Eastern District of Texas, Joe J. Fisher, J., entered judgment for plaintiffs and denied manufacturers' motion for judgment notwithstanding the verdict, and manufacturers appealed. Consolidating cases for purposes of appeal, the Court of Appeals, 851 F.2d 742 reversed and remanded. On remand the jury awarded each plaintiff past and future damages, and manufacturers appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that admitting as party admissions excerpts from posttrial briefs filed by asbestos manufacturers in separate action was reversible error.

Reversed and remanded.

1. **Evidence 207(1)**

Absent highly unusual circumstances, appellate briefs filed in a different case are not properly regarded as party admissions. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

2. **Evidence 207(1)**

Posttrial briefs filed by asbestos manufacturers in separate declaratory judgment action against their insurers to establish liability insurance coverage for potential asbestos claims were not "party admissions" admissible over manufacturers' hearsay objections in personal injury actions by persons allegedly exposed to asbestos. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

3. **Evidence 208, 215(1)**

Statements made in a document, even in a "pleading," are not automatically properly regarded as admissions because the document was filed in a trial court. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

4. **Federal Courts 896**

In personal injury actions, improperly admitting as party admissions excerpts from asbestos manufacturers' posttrial briefs in separate declaratory judgment actions against insurance companies was reversible error; excerpts appeared to support personal injury plaintiffs' contention that their conditions were going to worsen and to contradict manufacturers' defense that plaintiffs were unlikely to contract the diseases in issue. Fed. Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

George T. Shipley, Baker & Botts, Houston, Tex., for Owens-Illinois, Inc.

Jeffrey B. McClure, Donald J. Verplancken, Butler & Binion, Houston, Tex., for Celotex Corp.

R. Lyn Stevens, Weller Whellus & Green, Beaumont, Tex., Thomas M. Peterson, Robert S. Daggett, Brobeck, Phleger & Harrison, San Francisco, Cal., for Fibreboard Corp.

Frank Bean, Bean & Manning, Houston, Tex., for Eagle-Picher Industries, Inc.

Robert E. Ballard, Kronzer, Abraham, Watkins, Nichols, Ballard & Friend, Lawrence Madeksho, Houston, Tex., for all plaintiffs-appellees.

Appeal from the United States District Court for the Eastern District of Texas.

Before, POLITZ, JOLLY, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

James Dartez is before this court in his third attempt to uphold a favorable jury verdict on his claim of injury from asbestos exposure. Companion appellees Hardy, Smith, Overstreet and Burke appear before us a second time in the same predicament. The previous judgments against several

asbestos manufacturers were reversed for errors in the admission of evidence. The present judgments are also tainted with evidentiary error. We reverse and remand yet again.

I.

In a 1986 trial, these[1] plaintiffs introduced in evidence excerpts from appellate briefs filed by two of the defendants in separate declaratory judgment actions against their insurers to establish the existence of liability coverage for asbestos claims. The defendants objected to the introduction of the briefs on hearsay grounds, Fed.R.Evid. 802, but the district court admitted them as admissions of a party opponent. Fed.R.Evid. 801(d)(2). Following a jury verdict for plaintiffs, this court reversed, holding that appellate briefs are not properly regarded as admissions, and the court prejudicially erred in allowing their introduction. *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742 (5th Cir. 1988).

On remand, the parties agreed to limit the trial to three jury issues: whether the plaintiffs were exposed to the defendants' products; whether such exposure was a producing cause of an asbestos-related disease; and damages. Undaunted by *Hardy*, plaintiffs offered as evidence excerpts from post-trial briefs filed by some of the defendants in 1985 in a case in California Superior Court. In the California case, the defendants were once again seeking to establish the existence of liability insurance coverage for potential asbestos claims. None of the plaintiffs in this case participated in the

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[1] The first judgment in favor of plaintiff Dartez was reversed in *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985). His lawsuit was consolidated on remand with those of the other appellees.

California case in any way. Filed at the close of one phase of a multi-phase trial, the briefs summarized the evidence which had been presented to that point. Just as had happened in *Hardy*, defendants objected to admission of the briefs as hearsay; plaintiffs characterized them as admissions of a party opponent. The district court agreed with plaintiffs and overruled the objection.

After a four-day trial, the jury awarded each plaintiff one million dollars for past damages and one million dollars for future damages. The court felt constrained to order 70% remittiturs, which, together with interest and other adjustments, resulted in judgments ranging from about $535,000 to $700,000.

Needless to say, the asbestos manufacturers contend that the district court abused its discretion by violating the rule of *Hardy* and admitting the post-trial briefs.[2] Because this issue is dispositive, we need not address appellants'

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[2]Only one of the four appellants in this case, Fibreboard Corp., filed the post-trial brief in California and the plaintiffs did **not** offer the excerpts against the other appellants. Plaintiffs argue that since the other appellants did not request a limiting instruction, they have waived their right to challenge the admission of the excerpts. We disagree. Appellants may have waived that specific ground of objection, but all of the appellants objected to the admission of the excerpts on hearsay grounds. Therefore they have not waived their right to challenge the admission of the excerpts as if the post-trial briefs had been filed by all of the appellants.

challenge to the sufficiency of evidence of damages.

II.

[1, 2] Absent highly unusual circumstances, appellate briefs filed in a different case "are not properly regarded as party admissions." *Hardy*, 851 F.2d at 746. That opinion acknowledged the general rule that, with some important exceptions, trial court pleadings of a party in one case may be admissible in a different case as evidentiary admissions of that party. *Id.* at 745; Fed.R.Evid. 801(d)(2). However, our court noted, there is no similar rule covering appellate briefs, because such briefs are distinguishable from trial court pleadings:

> Trial court pleadings, at least to the extent that they are not hypothetical or in the alternative, generally constitute a statement by the pleader as to the occurrence of certain historical facts in the real world. However, appellate briefs, by their very nature, must confine themselves to making statements not about the facts as they unfolded in the real world, but about *what the trial record shows.* Cf. 9 J.Moore, B. Ward & J. Lucas, *Moore's Federal Practice* §228.02[2.-1] at 28-8 (2d ed. 1987). Appellate briefs may not properly purport to be statements of what the real world facts are, but must rather be statements of what the trial record reflects. The distinction involved here is crucial.

Id. (emphasis in original). Because appellate briefs are restricted to the facts in the record, characterizing a brief's summary of record facts as an admission "is bound to be uncertain in the best of circumstances and dangerously misleading in most others." *Id.* In an appellate brief, a party is not free to give his own version of the "real world"

facts, but must simply recite the facts as developed in the record. Since post-trial briefs are also restricted to record facts, the same concerns appertain in this case.

Plaintiffs argue that *Hardy* should not control this case for several reasons. First, they contend that this case involves the type of "highly unusual circumstances" which *Hardy* indicated might justify treating a brief as an admission. *See Hardy*, 851 F.2d at 746. They do not specify those unusual circumstances, nor are any apparent in the record. In a recent case, the First Circuit found "unusual circumstances" suggested by *Hardy*. *Kassel v. Gannett Co.*, 875 F.2d 935, 952 & n. 17 (1st Cir. 1989). There, however, the brief in question was written not by an attorney, but by the plaintiff himself, and the statements in the brief did not purport to be anything other than the plaintiff's own version of the real world facts. In contrast, the asbestos manufacturers' briefs were written by attorneys as summaries of evidence adduced at trial. There are no comparable "highly unusual circumstances" in this case.

Second, plaintiffs argue that *Hardy* constitutes an impermissible amendment of Rule 801(d)(2) and was therefore an incorrect decision. Both the law of the case doctrine, *Knotts v. United States*, 893 F.2d 758, 761 (5th cir. 1990), and the rule that one panel of this court cannot overrule an earlier decision of another panel, *In re Bessent*, 831 F.2d 82, 84 (5th Cir. 1987), prevent us from considering this contention.[3]

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[3]We note, however, that other courts have shared Hardy's concern. *E.g., Kassel v. Gannett Co.*, 875 F.2d 935, 952 n. 17 (1st Cir., 1989) ("We share the reluctance of the Fifth Circuit routinely to treat appellate briefs submitted by a party in

Plaintiffs next attempt to rely on the general rule allowing the use of pleadings filed by a party in a different case as admissions. This argument fails for several reasons. A post-trial brief is not a "pleading." *See, e.g., Taylor v. Allis-Chalmers Manufacturing Co.*, 320 F.Supp. 1381, 1385 (E.D.Pa. 1969), *aff'd on opinion below*, 436 F.2d 416 (3d Cir. 1970) (distinguishing pretrial memoranda from pleadings, which are "generally considered to mean papers such as the complaint, answers, and reply which frame the issues."). Even if the post-trial briefs were "pleadings", they are not necessarily regarded as evidentiary admissions, as our court has recognized. *See, e.g., Continental Insurance Co. of New York v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971)(when inconsistent positions are taken in pleadings in a complicated joinder situation, involving ... the contingent liability of third parties, such pleadings may not be used as evidentiary admissions); *Whatley v. Armstrong World Industries, Inc.*, 861 F.2d 837, 839 (5th Cir. 1988) (liberal pleading and joinder rules prevented the use of arguably inconsistent pleadings and discovery as admissions); *McNeese v. Reading and Bates Drilling Co.*, 749 F.2d 270, 274-75 (5th Cir. 1985) (district court did not abuse its discretion by refusing to treat as an admission an interrogatory answer

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one action as evidentiary admissions against that party in another action."); *see also Brownko International, Inc. v. Ogden Steel Co.*, 585 F.Supp. 1432, 1438 (S.D.N.Y. 1983) ("Extending the concept of a Rule 801 admission to assertions of this nature in briefs of counsel is not required by the letter or spirit of the rule and would open a veritable Pandora's box....").

which was in the nature of alternative pleading).

[3] Plaintiffs finally attempt to distinguish *Hardy* factually, but they must concede that the only distinction between the appellate briefs in *Hardy* and the post-trial briefs in this case is that the latter were filed in a trial court. That distinction is not sufficient because both types of briefs are limited to record facts. Their use as admissions engenders the same concerns which prompted *Hardy's* rule that appellate briefs are not properly treated as admissions. And as we have noted, statements made in a document, even in a "pleading," are not automatically properly regarded as admissions because the document was filed in a trial court. Procedural context may also prevent the use as admissions of statements made by a party in the trial court. For example, in a motion to transfer venue a defendant may make statements that are not "concessions for all purposes, but merely operating assumptions which must be taken as true in order to resolve [the] collateral issue...." 4 D. Louisell & C. Mueller, *Federal Evidence* § 425 (1980 ed. & 1990 supp.). Such statements should not later be regarded as an admission by the party. *Id; see also Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 841-43 (D.C.Cir. 1981), *cert. denied,* 455 U.S. 994, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982) (concession of the existence of an injury only for purpose of arguing third-party motion concerning where injury occurred was not properly treated as evidentiary admission of the existence of an injury). Thus, the fact that the post-trial briefs were filed in a trial court does not require that they be admitted as admissions, and *Hardy* governs this case. The district court abused its discretion by admitting excerpts from the asbestos manufacturer's briefs into evidence.

[4] Although the admission of the post-trial brief excerpts was error, it would not be reversible error unless it

affected the manufacturers' substantial rights. Fed.R.Evid. 103(a)(1). Plaintiffs' case rested largely on the future potential worsening of their medical conditions because of asbestos-related diseases. The excerpts read to the jury summarized the testimony of experts in the California insurance litigation about the progressive nature of asbestos-related diseases. These "admissions" appeared both to support plaintiffs' contention that their conditions were going to worsen and to contradict the manufacturers' defense that these plaintiffs were unlikely to contract the diseases in issue. Plaintiffs' counsel admitted at oral argument that this seeming inconsistency in appellates' positions in California and at trial below motivated the jury's generous verdicts. We agree that the admission of the excerpts from the briefs was seriously prejudicial. It was bound to confuse the jury, who would not easily grasp the difference between the proof necessary to establish general insurance coverage for asbestos exposure injuries and that necessary to show whether these plaintiffs' individual conditions had or might progress ineluctably. *See Hardy*, 851 F.2d at 747. Accordingly, we conclude that appellants' substantial rights were affected by the admission of the post-trial brief.

For the foregoing reasons, the trial court's judgments must again be REVERSED, and this case is REMANDED for a new trial.

APPENDIX C

WILLIAM B. HARDY, Plaintiff-Appellee,
v.
JOHNS-MANVILLE SALES CORPORATION,
Defendants,

FIBREBOARD CORPORATION, et al.,
Defendants-Appellants.

RICHARD C. SMITH, SR.,
Plaintiff-Appellee,
v.
JOHNS-MANVILLE SALES CORPORATION, et al.,
Defendants-Appellants.

JAMES M. DARTEZ, Plaintiff-Appellee.
v.
JOHNS-MANSVILLE SALES CORPORATION, et al.,
Defendants,

FIBREBOARD CORPORATION, et al.,
Defendants-Appellants.

CECIL A. OVERSTREET, Plaintiff-Appellee,
v.
JOHNS-MANVILLE SALES CORPORATION, et al.,
Defendants,

FIBREBOARD CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., CELOTEX CORPORATION, EAGLE-PICHER INDUSTRIES, INC., PITTSBURGH-

CORNING CORPORATION, OWENS-ILLINOIS, INC., KEENE CORPORATION, and RAYMARK INDUSTRIES, INC., Defendants-Appellants.

JOHN DAVID BURKE, SR., Plaintiff-Appellee,
v.
JOHNS-MANVILLE SALES CORPORATION, et al.,
Defendants,

OWENS-ILLINOIS, INC. et al.,
Defendants-Appellants.

Nos. 87-2002 to 87-2006

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
Aug. 9, 1988.

Plaintiffs sued to recover for personal injuries they had allegedly sustained as result of their exposure to manufacturers' asbestos products. The United States District Court for the Western District of Texas, Joe J. Fisher, J., entered judgment in favor of plaintiffs and denied manufacturer's motion for judgment notwithstanding the verdict, and manufacturers appealed. Consolidating cases for purposes of appeal, the Court of Appeals, Garwood, Circuit Judge, held that: (1) appellate briefs which asbestos manufacturers had filed in declaratory judgment actions against insurance companies were not "party admissions," excerpts from which could be used by personal injury plaintiffs to establish that injury and disease process caused by asbestos inhalation starts virtually immediately, and (2) erroneous admission, over hearsay objection, of excerpts from briefs constituted reversible error.

Reversed and remanded.

1. **Evidence 222(1)**

Appellate briefs filed by party in separate actions, to which person proffering briefs was not party, are generally not admissible as "party admissions" absent some highly unusual circumstances. Fed. Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

2. **Evidence 222(1)**

Appellate briefs which asbestos manufacturers filed in declaratory judgment actions against insurance companies were not "party admissions," excerpts from which could be used by personal injury plaintiffs to establish that injury plaintiffs to establish that injury and disease process caused by asbestos inhalation started virtually immediately; excerpts were not admissible over manufacturers' hearsay objection. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

3. **Appeal and Error 896**

Erroneous admission, as party admissions, of excerpts from appellate briefs filed by asbestos manufacturers in actions against insurance companies constituted reversible error; excerpts, suggesting that disease process caused by asbestos inhalation starts virtually immediately, were sufficiently damaging to have prejudiced manufacturers in plaintiffs' personal injury actions. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

O.J. Weber, Robert A. Black, Mehaffy, Weber, Keith & Gonsoulin, Beaumont, Tex., for Owens-Illinois Corp., Keene Corp., Fibreboard Corp.

George A. Weller, Beaumont, Tex., for Fibreboard Corp.

Gordon R. Pate, Beaumont, Tex., for Pittsburgh-Corning Corp.

Benckenstein, Norvell & Bernsen, Lipscomb Norvell, Jr., Beaumont, Tex., for Celotex Corp.

Michael B. Schwartz, Jeffrey B. McClure, Butler, Binion, Rice, Cook & Knapp, Houston, Tex., for Raymark Industries.

Robert E. Ballard, Grant Kaiser, Kronzer, Abraham, Watkins, Nichols, Ballard & Friend, Lawrence Madeksho, Houston, Tex., for plaintiffs, appellees.

Appeals from the United States District Court for the Eastern District of Texas.

Before GARWOOD, and JONES, Circuit Judges, and HITTNER,* District Judge.

* District Judge of the Southern District of Texas, sitting by designation.

GARWOOD, Circuit Judge:

Defendants-appellants Armstrong World Industries, Inc., Raymark Industries, Inc. (Raymark), Keene Corporation (Keene), Celotex Corporation, Eagle-Picher Industries, Inc., Fibreboard Corporation, Owens-Illinois, Inc., and Pittsburgh-Corning Corporation (collectively, Armstrong) appeal the district court's judgments on the jury's verdict in favor plaintiffs-appellees William B. Hardy, Richard C. Smith, Sr., James M. Dartez, Cecil A. Overstreet, and John David Burke, Sr. (collectively, the Hardy plaintiffs). We reverse.

FACTS AND PROCEEDINGS BELOW

During 1981, the five individual Hardy plaintiffs commenced separate diversity actions against Armstrong seeking damages for exposure to asbestos. On September 8, 1986, the district court ordered these separate actions

consolidated.[1] Trial before a jury began on November 17, 1986. The parties had stipulated that only three issues were to be submitted to the jury: (1) whether each plaintiff had an asbestos-related disease; (2) whether each plaintiff had been exposed to the products of the various defendants; and (3) the amount of damages each plaintiff was entitled to receive if the jury answered in the affirmative the first two special issues.

On the opening day of trial, the Hardy plaintiffs introduced in evidence an excerpt from an appellate brief that Raymark had filed in an Illinois declaratory judgment action seeking to establish that certain insurance coverage existed. Armstrong objected to the introduction in evidence of this excerpt on the ground that it was hearsay and not, as the Hardy plaintiffs contended, a prior inconsistent statement. The district court overruled this objection. On the following day, the Hardy plaintiffs introduced in evidence an excerpt from an appellate brief prepared by Keene in connection with a federal declaratory judgment action in the District of Columbia that Keene had brought to establish certain insurance coverage. Armstrong objected to the admission in evidence of this excerpt on the grounds that it was not a prior inconsistent statement[2] and that it violated Fed.R.Evid.

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[1] Two other actions were also consolidated with these five actions, but in those actions the parties settled. Accordingly, those two actions are not involved in this appeal.

[2] In objecting to the admission of this excerpt in evidence, Armstrong advised the court that its remarks concerning the excerpt from the Raymark brief were equally applicable to this

403. The district court overruled this objection. In its charge, the district court instructed the jury, among other things, that the products of Armstrong were "defective and unreasonably dangerous." Following Armstrong's objection to this instruction, the district court recalled the jury and gave a curative instruction. Nonetheless, Armstrong made a motion for a mistrial, which the district court overruled.

On November 21, 1986, the jury returned a verdict awarding damages to the Hardy plaintiffs in amounts ranging from $436,000 to $713,000. On November 25, 1986, the cases were severed and judgment entered in each of the five cases. On December 16, 1986, Armstrong filed a motion for judgment notwithstanding the verdict and a motion for new trial. On December 24, 1986, the district court denied these two motions. Armstrong then filed a notice of appeal in each of these five cases. These cases were subsequently consolidated for purposes of appeal.

Discussion

Armstrong complains that the district court (1) erroneously admitted in evidence excerpts from appellate briefs filed by attorneys representing Raymark and Keene in litigation unrelated to the present litigation; (2) erroneously admitted in evidence over their objection an excerpt from a report prepared by the Occupational Safety and Health Administration of the United States (OSHA); (3) improperly instructed the jury that Armstrong's products were defective and unreasonably dangerous and abused its discretion in not granting Armstrong's motion for a mistrial on that ground; and (4) awarded excessive damages to the Hardy plaintiffs. Finding merit in Armstrong's first asserted error, we do not

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excerpt, namely, that the excerpt was hearsay and thus inadmissible.

reach the others.

As noted above, the district court admitted both the Raymark appellate brief excerpt and the Keene appellate brief excerpt over Armstrong's objections that these excerpts were hearsay and thus inadmissible. Both of the suits in which the challenged appellate briefs were filed related to liability insurance coverage for asbestos claims; in neither suit were any of the plaintiffs below parties, not did the suits specifically concern the claims, circumstances, exposures, or injuries of any of the plaintiffs. At trial, the Hardy plaintiffs urged that these excerpts were admissible either as prior inconsistent statements pursuant to Fed.R.Evid. 801(d)(1)(A) (the Raymark excerpt) or as admissions pursuant to Fed.R.Evid. 801(d)(2) (the Keene excerpt). The Hardy plaintiffs no longer contend that any of these excerpts were properly admissible as prior inconsistent statements.[3] *See* Fed.R.Evid. 801(d)(1)(A). However, the Hardy plaintiffs do maintain that both of these excerpts were properly admitted as party admissions pursuant to Rule 801(d)(2).[4] We

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[3] At the time that these two excerpts were offered in evidence, there had been no testimony by any declarant of the statements contained in these two excerpts, which is a prerequisite to the exercise of Rule 801(d)(1)(A).

[4] It seems plain that under no theory could it be argued that the Raymark brief excerpt was admissible against any of the defendant-appellants other than Raymark, or that the Keene brief excerpt was admissible against any of the defendants-appellants other than Keene. However, this ground of objection was not urged

disagree.

[1,2] Although there is a well-established rule that factual allegations in the trial court pleadings of a party in one case may be admissible in a different case as evidentiary admissions of that party,[5] *see Continental Insurance Company of New York v. Sherman, 439 R.2d 1294,1298 (5th Cir.1971),* there is no similar authority that appellate briefs submitted by a party in one action may be used against that party in a different action between others as evidentiary admissions of that party. There is a basic difference between the two situations. Trial Court pleadings, at least to the extent that they are not hypothetical or in the alternative, generally constitute a statement by the pleader as to the

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below (nor was any limiting instruction requested),and it has not been urged on appeal. Thus we regard it as waived and we treat the matter as if the briefs in question were filed by all defendants (which is substantially the way the objections were made below and have been urged on appeal).

[5] There are some important exceptions to this rule. For example, when " inconsistent positions [are] taken in pleadings in a complicated joinder situation, involving ... the contingent liability of third parties, such pleadings may not be used as evidentiary admissions." *Continental Insurance Company of New York v. Sherman, 439 F.2d 1294, 1298 (5th Cir.1971). See also Douglas Equipment, Inc. v. Mack Trucks, Inc., 471 F.2d 222, 224-25 (7th Cir.1972)*

occurrence of certain historical facts in the real world. However, appellate briefs, by their very nature, must confine themselves to making statement not about the facts as they unfolded in the real world, but about *what the trial court record shows*. *Cf.* 9 J. Moore, B. Ward & Lucas, *Moore's Federal Practice* ¶ 228.02[2.-1] at 28-8(2d ed. 1987). Appellate briefs may not properly purport to be statements of what the real world facts are, but must rather be statements of what the trial court record reflects. The distinction involved here is crucial. Because appellate briefs must of necessity refer to what the record reflects as distinguished from what the real world facts actually are, and because these two sets of facts are not necessarily identical (indeed, they may well diverge at crucial junctures), using statements about record facts as substantive evidence, *i.e.*, to establish the truth of the matter asserted in those statements, is bound to be uncertain in the best of circumstances and dangerously misleading in most others. Further, allowing in evidence, as party admissions, statements in appellate briefs has a special danger of creating jury confusion, because appellate briefs address the facts shown by the record below only as they are relevant to the specific legal questions presented by that particular appeal. The danger of confusion in this respect is especially great where, as here, the cases in which the briefs are filed are so different from that in which they are sought to be placed in evidence.

These are the same sorts of considerations that led us to limit the admissibility of third-party, contingent liability complaints. *See* note 5 *supra*. While we have found no cases dealing with the admissibility, as party admissions, of appellate briefs filed in other different actions between different parties, we conclude that, at least absent some highly unusual circumstances not present, such briefs are not properly regarded as party admissions. *Cf. Taylor v. Allis-*

Chambers Manufacturing Co.., 320 F.Supp. 1381, 1384-85 (E.D.Pa.1969), *aff'd on opinion below*, 436 F.2d 416 (3d Cir.1970)(distinguishing between pleadings and trial court pretrial memoranda). We therefore hold that the district court abused its discretion in allowing the Raymark and Keene appellate brief excerpts to be introduced in evidence as admissions of a party-opponent pursuant to Rule 801(d)(2).

[3] Having determined that admission in evidence of these two excerpts was error, we must next determine whether it affected Armstrong's substantial rights. *See* 28 U.S.C. 2111; Fed.R.Evid. 103(a)(1); *cf.* Fed.R.Civ.P. 61 (substantial justice standard). *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2883(1973 & Supp.1987). We cannot say with fair assurance that the verdict against Armstrong was not substantially swayed by the admission of this evidence. Both challenged excerpts contain statements that were quite damaging to Armstrong's contention in relation to the first special issue that mere exposure to asbestos does not necessarily result in injuries [that] produce diseases almost immediately," which the Hardy plaintiffs had argued to the jury.[6] For example, the

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[6] Armstrong presented medical evidence that at least one plaintiff did not have asbestosis and that the conditions of the remaining plaintiffs were not progressive; its evidence also tended to show that the present conditions of the plaintiffs were not severely disabling. Several plaintiffs had a significant history of smoking. There was scant testimony of loss of earnings or prior medical expenses. The central thrust of the plaintiffs' cases was the likely *future*

first excerpt begins:

> "Asbestos-related diseases are progressive in nature, reflecting ' a continuing process of injury going on within the lungs which slowly builds up to the point where clinical signs of lung impairment become obvious either to the individual or to the physician.' "Enormous quantities of asbestos fibers imbed permanently and indestructibly in the lungs, causing immediate, continuing and cumulative damage to the lung's cells and tissues." [7]

Similarly, the second excerpt states:

> "The injury and disease process caused by asbestos inhalation starts virtually immediately. Persons with clinically diagnosed conditions, asbestosis, mesothelioma, and lung cancer, unquestionably are all characterized by a progressive injury occurring continuously after inhalation ceases.

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worsening of their conditions, including the development of cancer, and substantial likely large future medical expenses.

[7] This is how the "excerpt" of the Raymark brief as admitted in evidence reads. The brief itself actually commences the first sentence quoted in the above text-which is contained in the introductory portion of the "Argument" section of the brief-with the statement, "The trial court correctly found that." The second sentence quoted in the above text is from the same section of the brief, and in the brief itself the sentence actually commences with the statement, "The medical evidence overwhelmingly demonstrated that."

"The medical evidence is clear that with respect to persons who have clinically manifested asbestos-related conditions;

"A). Injury commences at or shortly after a claimants [*sic*] initial inhalation of asbestos fibers; and

"B). Injury progresses continuously after inhalation ceases."[8]

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[8] This is how the "excerpt" of the Keene brief as admitted in evidence reads. The first sentence quoted in the above text is from a portion of the brief entitled "The Medical Testimony." and in the brief itself this sentence actually begins with the statement that Dr. Kagan, a professor at Georgetown University called by Keene, "testified that" (and at the end of the sentence record page citations are given in the brief itself). The second sentence quoted in the above text is from the same portion of the brief, and in the brief itself actually commences with the statement,"Dr. Kagan also testified that, as to"(and in the brief itself it is also followed by record page citations). The third sentence quoted in the above text is from the "Argument" section of the brief, and in the brief itself this sentence actually commences, "As found by the District Court, J.A. IX at 3534," (and in the brief itself clauses (A) and (b) are each footnoted with several citations to pages of the record).

In our view, each excerpt was itself sufficiently damaging to have caused Armstrong strong prejudice. We also note that admitting in evidence these excerpts from appellate briefs filed in declaratory judgment actions seeking to establish insurance coverage was almost certain to have confused the jury with respect to the merits of the present personal injury damages actions. Given the prejudicial nature of this evidence under the circumstances of this case, and its substantial potential to engender confusion among the jurors, we find it impossible to conclude that Armstrong's substantial rights were likely not affected by the admission of the challenged excerpts. We therefore determine that the judgments against appellants must be reversed and remanded for a new trial.

Conclusion

Accordingly, the judgments against appellants are reversed, and each of the causes is remanded for a new trial.

REVERSED AND REMANDED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-2646

JAMES M. DARTEZ, Plaintiff-Appellee,
v.
OWENS-ILLINOIS, INC., et al., Defendants-Appellants.

RICHARD C. SMITH, SR., Plaintiff-Appellee,
v.
OWENS-ILLINOIS, INC., et al., Defendants-Appellants.

WILLIAM B. HARDY, Plaintiff-Appellee,
v.
OWENS-ILLINOIS, INC., et al., Defendants-Appellants

CECIL OVERSTREET, Plaintiff-Appellee,
v.
OWENS-ILLINOIS, INC. et al., Defendants-Appellants.

JOHN D. BURKE, Plaintiff-Appellee,
v.
OWENS-ILLINOIS, INC., et al., Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION

FOR REHEARING EN BANC

(Opinion September 11, 5 Cir., 1990 __ F.2d _)

(NOVEMBER 14, 1991)

Before POLITZ, JOLLY and JONES, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) The Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones

United States Circuit Judge

REHG-6

DOCKET NO. 875

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO VI)

BEFORE JOHN F. NANGLE, CHAIRMAN, S. HUGH DILLIN,* MILTON POLLACK,* LOUIS H. POLLAK, HALBERT O. WOODWARD, ROBERT R. MERHIGE, JR. AND WILLIAM B. ENRIGHT, JUDGES OF THE PANEL.

OPINION AND ORDER

JUDGE NANGLE, CHAIRMAN, DELIVERED THE OPINION OF THE PANEL, IN WHICH JUDGES POLLAK, WOODWARD, MERHIGE AND ENRIGHT JOINED.

On January 17, 1991, the Panel issued an order to show cause why all pending federal district court actions not then in trial involving allegations of personal injury or wrongful death caused by asbestos should not be centralized in a single forum under 28 U.S.C. § 1407. Because of the difficulty in serving this order on the enormous number of

* Judges Dillin and Pollack did not participate in the decision of this matter.

parties in this docket, the Panel relied on the clerks of all district courts to serve the parties to actions in their respective districts.[1] As a result, the parties to the 26,639 actions pending in 87 federal districts and listed on the following Schedule A are subject to the Panel's order.[2] More than 180 pleadings have been filed in response to the Panel's order, and a four hour hearing on the question of transfer was held on May 30, 1991 in New York City, at which time 37 counsel presented oral argument. In many

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[1] It appears that the only districts with pending asbestos actions that did not effect service of the Panel's order are the Eastern District of Wisconsin and the District of Rhode Island. In view of the Panel's disposition of this docket, the actions pending there will be treated as potential tag-along actions in accordance with the Panel's Rules. See Rules 12 and 13, R.P.J.P.M.L., 120 F.R.D. 251, 258-59(1988).

[2] The Statistical Division of the Administrative Office of the United States Courts reports that as of March 31, 1991, nearly 31,000 actions were pending in federal districts. Based on Panel communications with courts throughout the country, the approximately 4,000 pending actions not embraced by the present order likely include actions that, as of January 17, 1991, were overlooked, in trial or already at least partially tried but not yet statistically closed because, inter alia, claims against one or more defendants were stayed under the Bankruptcy Code.

instances the attorneys filing these pleadings or participating in oral argument were representing the views of large groups of parties.

Supporting transfer are plaintiffs in approximately 17,000 actions (including a core group of more than 14,000 plaintiffs represented by over 50 law firms and 30 defendants (24 of which are named in more than 20,000 actions). Opposing transfer are plaintiffs in at least 5,200 actions and 454 defendants. The positions of those parties that have expressed a preference with respect to transferee district are varied. Many parties suggest centralization in what amounts to their home forum. The Eastern District of Pennsylvania is the district either expressly favored or not objected to in the greatest number of pleadings. The Eastern District of Texas, which is the choice of the aforementioned core group of 14,000 plaintiffs, is also the district that has generated the most opposition from defendants. Other suggested districts that go beyond the home forum approach are the District of the District of Columbia, the Eastern District of Louisiana, The Northern District of Ohio, and the Eastern District of New York. Some parties' forum recommendations are expressed in the form of a suggested individual transferee judge or transferee judge structure.

On the basis of the papers filed and the hearing held, the Panel finds that the actions in this litigation involve common questions of fact relating to injuries or wrongful death allegedly caused by exposure to asbestos or asbestos containing products, and that centralization under § 1407 in the Eastern District of Pennsylvania will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation.

DISCUSSION

Any discussion of § 1407 transfer in this docket must begin with the recognition that the question does not arise in

a vacuum. Indeed, the impetus for the Panel's order to show cause was a November 21, 1990 letter signed by eight federal district judges responsible for many asbestos actions in their respective districts.[3] These judges, citing the serious problem that asbestos personal injury litigation continues to be for the federal judiciary, requested that the Panel act on its own initiative to address the question of § 1407 transfer. Furthermore, as the title of this docket suggests, this is the sixth time that the Panel has considered transfer of asbestos litigation. On the five previous occasions (1977,1980,1986, and 1987) that the Panel considered the question, it denied transfer in each instance.[4]

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[3] The signatories to this letter are Judges Walter J. Gex,III(S.D.Miss.), Thomas D. Lambros(N.D.Ohio), Alan H. Nevas(D.Conn.), Richard A.Schell(E.D.Tx.), Charles Schwartz,Jr.(E.D.La.), Charles R. Weiner(E.D.Pa.), Charles R. Wolle(S.D.Iowa), and Rya W. Zobel(D.Mass.). Additionally, Judge Jack B. Weinstein(E.D.N.Y.) has contacted the Panel staff and requested that he also be considered a signatory to the letter.

[4] In re Asbestos and Asbestos Insulation Material Products Liability Litigation, 431 F.Supp. 906 (J.P.M.L.1977); In re Asbestos Products Liability Litigation (No.II),MDL-416(J.P.M.L.March 13,1980)(unpublished order); In re Asbestos School Products Liability Litigation,606 F.Supp. 713(JP>M>L> 1985); In re Ship Asbestos Products Liability Litigation, MDL-676(J.P.M.L.FEB.4,1986)(unpublished

The Panel's constancy is not as dramatic as a mere recitation of the denials might suggest, however. The 1986 and 1987 dockets considered by the Panel involved only five and two actions, respectively. The 1985 Panel decision pertained not to personal injury/wrongful death asbestos actions but rather to property damage claims of school districts that incurred significant costs in removing asbestos products from school buildings. The denial in the 1980 Panel docket was based almost exclusively on the movants' failure to offer any distinctions that would warrant a disposition different from the Panel's first asbestos decision in 1977.

It is only in the 1977 decision, pertaining to 103 actions in nineteen districts, that the Panel offered any detailed analysis of its asbestos litigation reasoning with respect to asbestos personal injury/wrongful death actions. In that decision, the Panel first listed the primary arguments of the responding parties that unanimously opposed transfer: advanced stage of proceedings in many of the actions; use of voluntary coordinating arrangements in several districts; lack of commonality among defendants and plaintiffs; circumstances of exposure predominantly unique to each action; individual questions of causation in each action; predominantly individual questions of the liability of each defendant in each action; local issues predominating in the discovery process; absence of possibility of inconsistent or overlapping class certifications; and the readily discernible nature of the principal area common to all actions, the state of medical and scientific knowledge at a particular time

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order); and In re Leon Blair Asbestos Products Liability Litigation, MDL-702 (J.P.M.L. Feb. 6, 1987) (unpublished order).

regarding the health hazards posed by exposure to asbestos.

In denying transfer in the 1977 decision, the Panel recognized the existence of some common questions of fact among the actions. For in that docket, as in the matter currently before the Panel, all actions contained allegations of personal injury or death as a result of exposure to asbestos or asbestos containing products. The Panel nevertheless held that the other criteria for §1407 transfer were not satisfied. In relevant part, the Panel stated:

> Many factual questions unique to each action or to a group of actions already pending in a single district clearly predominate, and therefore transfer is unwarranted .... Furthermore, many of these actions already are well advanced. Some of the actions have been pending for up to four years, and trial dates or discovery cutoff dates have been set in several actions. Under these circumstances, transfer would not further the purposes of Section 1407.

In re Asbestos and Asbestos Insulation Material Products Liability Litigation, 431 F.Supp. 906, 910 (J.P.M.L. 1977).

Many of the parties presently opposing transfer in this docket rely on the facts and reasoning of the Panel's 1977 transfer decision. They insist that the situation that warranted denial then not only still prevails but has been magnified by the greatly increased number of actions and parties in federal asbestos personal injury/wrongful death litigation -- more than 30,000 pending federal actions now, as opposed to the 103 actions subject to the Panel's 1977 decision. In our view, it is precisely this change that now leads us to conclude that centralization of all federal asbestos personal injury/wrongful death actions, in the words of 28 U.S.C. §1407(a), "will be for the convenience of parties and

witnesses and will promote the just and efficient conduct of such actions." In short, we are persuaded that this litigation has reached a magnitude, not contemplated in the record before us in 1977, that threatens the administration of justice and that requires a new, streamlined approach.

The Panel is not the first to reach such a conclusion. Just this past March 1991, the Judicial Conference Ad Hoc Committee on Asbestos Litigation, whose members were appointed by Chief Justice William H. Rehnquist, stated as follows:

> The committee has struggled with the problems confronting the courts of this nation arising from death and disease attributable to airborne asbestos industrial materials and products. The committee has concluded that the situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively.

After extensive study, the Institute for Civil Justice of the Rand Corporation in 1985 observed, with respect to how the civil justice system handles asbestos claims, that --

> The picture is not a pretty one. Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses.

The ensuing five years have seen the picture worsen: increased filings, larger backlogs, higher costs, more

bankruptcies and poorer prospects that judgments -- if every obtained -- can be collected.

It is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.
Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, 1-3 (1991) (footnote omitted) (hereinafter Asbestos Committee Report). The Committee pointed out that presently in the federal system nearly two new asbestos actions are being filed for every action terminated, and that at the current rate, there will be more than 48,000 actions pending in the federal courts at the end of three years. Asbestos Committee Report. supra, at 8.

The Committee also discussed the ongoing change in the demographics of asbestos litigation in the federal courts:

> In 1984, when the Federal Judicial Center held its first asbestos conference, asbestos litigation in the federal courts was largely concentrated in only four district courts. Since that time, however, asbestos

> cases have infiltrated virtually every federal district. Asbestos litigation must therefore be viewed as a national problem rather than merely a local or regional one, especially with the number of Americans affected.

Asbestos Committee Report, supra. at 9 (footnote omitted).

Conclusions similar to those of the Judicial Conference Asbestos Committee have also been reached by judges actively involved in asbestos litigation. In perhaps the most recent comprehensive review of asbestos litigation, Judge Jack B. Weinstein (E.D.N.Y.) observed:

> The large number of asbestos lawsuits pending throughout the country threatens to overwhelm the courts and deprive all litigants, in asbestos suits as well as other civil cases, of meaningful resolution of their claims .... Several commentators have recounted the inefficiencies and inequities of case-by-case adjudication in the context of mass tort disasters. See, e.g., Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 Ind. L.J. 561 (1987); Trends in Asbestos Litigation ((Federal Judicial Center 1987); Rubin, Mass Torts and Litigation Disasters, 20 Ga. L. Rev. 429 (1986); Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1), 96 Harv. L. Rev. 1143 (1983); Comment, Federal Mass Tort Class Actions; A Step Toward Equity and Efficiency, 47 Alb. L. Rev. 1180 (1983).
>
> The heyday of individual adjudication of asbestos mass tort lawsuits has long passed.

See [Asbestos Committee Report], supra, at 7 ("one point on which plaintiffs' counsel, defense counsel and the judiciary can agree is that the present way in which we have attempted to resolve asbestos cases has failed"). The reasons are obvious: the complexity of asbestos cases makes them expensive to litigate; costs are exacerbated when each individual has to prove his or her claim de novo; high transaction costs reduce the recovery available to successful plaintiffs; and the sheer number of asbestos cases pending nationwide threatens to deny justice and compensation to many deserving claimants if each claim is handled individually. The backlog is eroding a fundamental aspiration of our judicial system to provide equality of treatment for similarly situated persons. Cf. [Asbestos in the Courts: The Challenge of Mass Toxic Torts (RAND, Inst. of Social Justice 1985)], supra, at 12 (recent wave of asbestos litigation marked by high concentration of claims, dominance of characteristics of individual asbestos cases, behavior of parties, lawyers and the attributes of judges "created a situation in which dispositions are slow, costs are high, and outcomes are variable").

Overhanging this massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on

> the books of many present defendants, would lead to a declaration of insolvency -- as in the case of some dozen manufacturers already in bankruptcy.

In re Johns-Manville Corporation, et al., No. 90-3973, slip op. at 61-63 (E.D.N.Y. May 16, 1991).

Given the dimensions of the perceived problem in federal asbestos litigation, it is not surprising that no ready solution has emerged. The Judicial Conference Asbestos Committee concluded that the only true solution lies in Congressional legislation. Nevertheless, it stressed that "[a]t the same time, or failing congressional action, the federal judiciary must itself act now to achieve the best performance possible from the system under current law." Asbestos Committee Report, supra, at 4. The Committee also noted that the panel's order to show cause was pending at the time of the issuance of the Committee's report. The Committee observed that "this committee, by its recommendations, does not intend to affect or restrict in any way the actions of the Panel under 28 U.S.C. §1407 or reduce the Panel's jurisdiction or authority." Id. at 22.[5]

It is against this backdrop that the Panel's decision and role in this litigation must be understood. First of all, our decision to order transfer is not unmindful of the fact that the impact of asbestos litigation varies from district to

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[5]The Committee also observed that, in the interest of centralizing asbestos claims to the greatest extent possible, the Panel's authority "could be expanded to allow the Panel to transfer actions for trial as well as for pretrial proceedings." Asbestos Committee Report, supra, at 31.

district, and that in some courts asbestos personal injury actions are being resolved in a fashion indistinguishable from other civil actions. It is not surprising, therefore, that parties and courts involved in such actions might urge that inclusion of their actions in multidistrict proceedings is inappropriate. The Panel, however, must weigh the interests of all the plaintiffs and all the defendants, and must consider multiple litigation as a whole in the light of the purposes of the law. In re Multidistrict Private Civil Treble Damage Litigation Involving Library Editions of Children's Books, 297 F.Supp. 385, 386 (J.P.M.L. 1968). It is this perspective that leads us to conclude that centralization in a single district of all pending federal personal injury and wrongful death asbestos actions is necessary.

Much of the argument presented to the Panel in response to its order to show cause is devoted to parties' differing (and often inconsistent) visions of §1407 proceedings: 1) some plaintiffs see centralized pretrial proceedings as a vehicle leading to a single national class action trial or other types of consolidated trials on product defect, state of the art and punitive damages, while many defendants staunchly oppose such a trial, favor a reverse bifurcation procedure where actual damages and individual causation are tried before liability, and hope to use §1407 proceedings to effect the severance of claims for punitive damages through a transferee court order directing that, upon the return of any case to its transferor district, such claims not be tried until claims for compensatory damages have been resolved in all federal cases; 2) some parties hope to persuade the transferee court to establish case deferral programs for plaintiffs who are not critically ill, or who have been exposed to asbestos but do not presently show any signs of impairment (i.e., pleural registries), while many plaintiffs assert that such procedures are unfair or unconstitutional; 3)

in response to the pressing concern about transaction costs in this litigation, some defendants consider §1407 transfer necessary in order to provide a single federal forum in which limits on plaintiffs' contingent fees can be addressed, while some plaintiffs maintain that transfer is necessary to prevent the depletion of defendants' limited insurance coverage by defense costs incurred in multiple districts; 4) some plaintiffs and defendants urge that transfer is necessary in order to develop through discovery proceedings nationwide product data bases on all asbestos products and corporate histories of all asbestos defendants, while other plaintiffs and defendants contend that such efforts would be of no utility and are simply designed to shift liability; 5) some plaintiffs are suggesting that defendants' finances are so fragile as to require limited fund class action determinations pursuant to Fed.R.Civ.P. 23(b)(1)(B), while other plaintiffs resist any attempt to restrict their right to pursue punitive damages; 6) some parties anticipate that a single transferee court would speed up case disposition and purge meritless claims, while others expect a system of spacing out claims so as not to overwhelm currently solvent defendants' cash flow and drive them into bankruptcy; and 7) some parties contend that a single transferee court is necessary for the purpose of exploring the opportunities for global settlements or alternative dispute resolution mechanisms, while other parties assert that such hopes are utopian at best as long as i) more than twice as many asbestos cases remain pending in state courts as in federal courts, and ii) currently stayed claims against bankrupt defendants cannot be addressed by the

transferee court.[6]

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[6]There appears to be some confusion among the parties concerning the interaction of the provisions of the Bankruptcy Code and §1407. Transfer under §1407 of an action containing claims against a defendant in bankruptcy has no effect on the automatic stay provisions of the Bankruptcy Code (11 U.S.C. §362). Claims that have been stayed in the transferor court remain stayed in the transferee court. The Panel, however, has never considered the pendency of such stayed claims in an action to be an impediment to transfer of the action. 28 U.S.C. §1407(a) authorizes the panel to transfer only "civil actions" and not claims. The complex multidistrict litigations before the Panel have often included actions brought against multiple defendants, the claims against one or more of which have been stayed as a result of bankruptcy. To have allowed the pendency of claims against a single bankrupt defendant to preclude the transfer of actions containing claims actively being litigated against common nonbankrupt defendants would have frustrated the essential purpose of §1407.

Some parties have urged the Panel to treat the bankruptcy reorganizations themselves as "civil actions" appropriate for transfer under §1407 to the transferee district. The reorganization proceedings are not subject to our order to show cause, and this question is therefore not ripe for a Panel decision. We have not

We enumerate these issues not for the purpose, as some parties seemingly misunderstand, of passing on their merits. The language of the first sentence of paragraph (b) of §1407 is quite clear about the proper forum for resolution of such issues -- "coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned" by the Panel (emphasis added). The Panel has neither the power nor the disposition to direct the transferee court in the exercise of its powers and discretion in pretrial proceedings. In re Plumbing Fixture

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addressed this question before and would be reluctant to do so until: 1) the transferee court determines that other alternatives, such as coordination with the concerned bankruptcy courts, are insufficient to accomplish the goals of §1407; and 2) other suggested means of transferring the bankruptcy reorganizations or relevant portions thereof have been fully explored by the transferee court and the concerned bankruptcy courts.

Finally, we note that to the extent that state court actions and bankruptcy proceedings are excluded from the ambit of the Panel's transfer decision, transfer will nonetheless have the salutary effect of creating one federal court with which such proceedings can be coordinated, to the extent deemed desirable by the concerned courts. Indeed, state court judges have communicated to the Panel that coordination among state courts and a single transferee court for the federal actions is an objective worthy of pursuit.

Cases, 298 F.Supp. 484, 489 (J.P.M.L. 1968).

We cite these issues only as illustrations of 1) the types of pretrial matters that need to be addressed by a single transferee court in order to avoid duplication of effort (with concomitant unnecessary expenses) by the parties and witnesses, their counsel, and the judiciary, and in order to prevent inconsistent decisions;[7] and 2) why, at least initially, all pending federal personal injury or wrongful death asbestos actions not yet in trial must be included in §1407 proceedings. For example, if, as some courts, parties and commentators have suggested, there are insufficient funds to fairly compensate all deserving claimants, this should be determined before plaintiffs in lightly impacted districts go to trial and secure recoveries (often including punitive damages) at the possible expense of deserving plaintiffs litigating in districts where speedy trial dates have not been available. Similarly, if there are economies to be achieved with respect to remaining national discovery, pretrial rulings or efforts at settlement, these should be secured before claims against distinct types or groups of defendants are separated out of the litigation. Finally, because many of the arguments of parties seeking exclusion from transfer are intertwined with the merits of their claims or defenses and affect the overall management of this litigation, we are unwilling, on the basis of the record presently before us, to carve out exceptions to transfer. We prefer instead to give

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[7]We note that to the extent any of these pretrial decisions are subject to appellate review pursuant to interlocutory appeal or writ of mandamus, §1407 transfer will also help to minimize the potential for inconsistent decisions from courts of appeals.

the transferee court the opportunity to conduct a substantive review of such contentions and how they affect the whole proceedings.

It may well be that on further refinement of the issues and close scrutiny by the transferee court, some claims or actions can be remanded in advance of the other actions in the transferee district. Should the transferee court deem remand of any claims or actions appropriate, the transferee court can communicate this to the Panel, and the Panel will accomplish remand with a minimum of delay. See Rule 14, R.P.J.P.M.L., 120 F.R.D. 251, 259-61 (1988).[8] We add that for those parties urging that resolution of this litigation lies primarily in the setting of firm, credible trial dates, §1407 transfer may serve as a mechanism enabling the transferee court to develop a nationwide roster of senior district and other judges available to follow actions remanded back to heavily impacted districts, for trials in advance of when such districts' overburdened judges may have otherwise been able to schedule them.

We remain sensitive to the concerns of some parties that §1407 transfer will be burdensome or inconvenient. We note that since §1407 transfer is primarily for pretrial, there is usually no need for the parties and witnesses to travel to

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[8]Those parties who may seek early remand of their actions or claims are reminded of i) Panel Rule 14(d)'s expression of the Panel's reluctance to order remand absent a suggestion of remand from the transferee judge, and ii) the special affidavit requirement of that Rule. 120 F.R.D. at 260. See also In re Holiday Magic Securities and Antitrust Litigation, 433 F.Supp. 1125, 1126 (J.P.M.L. 1977).

the transferee district for depositions or otherwise. See, e.g., Fed.R.Civ.P. 45(d)(2). Furthermore, the judicious use of liaison counsel, lead counsel and steering committees will eliminate the need for most counsel ever to travel to the transferee district. See Manual for Complex Litigation, Second, §20.22 (1985).[9] And it is most logical to assume that prudent counsel will combine their forces and apportion their workload in order to streamline the efforts of the parties and witnesses, their counsel, and the judiciary, thereby effectuating an overall savings of cost and a reduction of inconvenience to all concerned. See In re Nissan Motor Corporation Antitrust Litigation, 385 F.Supp. 1253, 1255 (J.P.M.L. 1974). Hopefully, combining such practices with a uniform case management approach will, in fact, lead to sizeable reductions in transaction costs (and especially in attorneys' fees).

In a docket of this size and scope, no district emerges as the clear nexus where centralized pretrial proceedings should be conducted. The Panel has decided to centralize this litigation in the Eastern District of Pennsylvania before Judge Charles R. Weiner. We note that: 1) more asbestos personal injury or wrongful death actions are pending in that district than any other; 2) the court there has extensive experience in complex litigation in general and asbestos litigation in particular; and 3) the court has graciously expressed its willingness to assume the responsibility for this massive undertaking. Furthermore, in the person of Judge

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[9]Liaison counsel would be called upon by the Panel to distribute future Panel orders regarding tagalong actions and any other matters to their liaison group as contemplated in Panel Rule 8(e). R.P.J.P.M.L., supra, 120 F.R.D. at 255.

Weiner the Panel finds a judge thoroughly familiar with the issues in asbestos litigation, a track record of accomplishment and successful innovation,[10] and, on the basis of the

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[10]The Asbestos Committee Report, supra, noted at 15:

> Judge Charles Weiner, the asbestos case manager in the Eastern District of Pennsylvania, is able to call upon over 20 active and senior judges in the district to handle asbestos cases on a priority basis. In addition to mandating standard, abbreviated pleadings, such as complaint, answer, and discovery requests, Judge Weiner meets regularly with counsel and handles on a regular basis all motions and discovery requests. Applying these sophisticated case management techniques, Judge Weiner and his colleagues have disposed of more than 2,000 cases through 1990.

Another testament to Judge Weiner's techniques comes from the Panel pleading of certain plaintiffs already before him in the Pennsylvania district:

> The Eastern District of Pennsylvania may be unique in another respect, and that again is due to the involvement of the Court. Perhaps no other jurisdiction has had the mutual cooperation of liaison counsel who have been instrumental, together with the Court in

pleadings before the Panel in which an opinion was

> attempting to resolve the asbestos problem. The adversary system remains, but the Court has eliminated the usual posturing of the litigants and has encouraged them to come up with programs and solutions. The classic example is the unique program established by counsel with the Court of binding arbitration through stipulated percentage of defendants' liability. The arbitrators are experts in asbestos litigation, and the medical issues are tried by submission on report. The average disposition rate is four cases in one day without judicial time.

Pleading 87, Response of Greitzer and Locks at 15.

Our reference to these passages is not meant to be an endorsement of any pretrial techniques to the exclusion of others, and in no way should be viewed as limiting Judge Weiner in his assessment of the appropriate tools to be used now that all federal personal injury/wrongful death asbestos actions will be before him for pretrial proceedings. We do consider such passages to be helpful, however, in allaying the fears of parties not familiar with Judge Weiner that §1407 transfer will result in their actions entering some black hole, never to be seen again.

expressed, a selection to which the majority of responding plaintiffs and defendants either expressly agree or are not opposed.

Many parties have suggested that the dynamics of this litigation make it impractical, if not impossible, for one single judge to discharge the responsibilities of transferee judge, while other parties have emphasized that more than a single transferee judge would dilute the judicial control needed to effectively manage the litigation. Varying suggestions have been made that the Panel appoint additional transferee judges to handle specific issues (e.g., class or limited fund determinations, discovery, settlement, claims administration, etc.), to deal with separate types of claims or defendants (e.g., maritime asbestos actions, railroad worker actions, friction materials actions, tire workers actions, etc.), or to divide the litigation along regional or circuit lines (helping to insure uniformity of decisions within each circuit pertaining, inter alia, to state law questions involved in the actions). Each of these suggestions has merit, as long as one judge has the opportunity to maintain overall control.

Section 1407(b) contemplates that multidistrict litigation may be conducted by "a judge or judges." It further expressly provides that "upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title." And the Panel has long expressed its willingness to appoint additional transferee judges in litigations whose size and complexity make it difficult for the original transferee judge to handle §1407 proceedings alone. See In re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs, 320 F.Supp. 586, 588 (J.P.M.L. 1970). We emphasize our intention to do

everything within our power to provide such assistance in this docket. Before making any specific appointments, however, we deem it advisable to allow the transferee judge to make his own assessment of the needs of this docket and communicate his preferences to us.

The Panel is under no illusion that centralization will, of itself, markedly relieve the critical asbestos situation. It offers no panacea. Only through the combined and determined efforts of the transferee judge and his judicial colleagues, of the many attorneys involved in asbestos matters, and of the parties, can true progress be made toward solving the "asbestos mess." This order does offer a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with as little unnecessary expense as possible.

Finally, in light of the Panel's disposition in this docket, it is necessary to remind parties and counsel of their continuing responsibility with respect to transfer of potential tag-along actions, including those either inadvertently overlooked at the time of the January 17, 1991 filing of the Panel's order to show cause or filed subsequent to the issuance of the Panel's order to show cause. We note that Panel Rule 13(e) provides as follows:

> Any party or counsel in actions previously transferred under Section 1407 or under consideration by the Panel for transfer under Section 1407 shall notify the Clerk of the panel of any potential "tag-along actions" in which that party is also named or in which that counsel appears.

R.P.J.M.L., supra, 120 F.R.D. at 259.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. §1407, the actions listed on the following Schedule A that are pending as of the date of this order, are not in

trial, and are pending outside the Eastern District of Pennsylvania, be, and the same hereby are, transferred to the Eastern District of Pennsylvania and, with the consent of that court, assigned to the Honorable Charles R. Weiner for coordinated or consolidated pretrial proceedings with the actions on Schedule A that remain pending in that district and are not in trial.[11]

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[11]The Panel's authority under §1407 is to transfer for "pretrial" proceedings; actions on Schedule A that have been resolved or are presently in trial are not intended to be within the scope of the Panel's transfer decision. Given the tremendous number of actions pending in almost every federal district, however, it is not possible for the Panel to know at any one time the current status of all actions on Schedule A. When, pursuant to §1407(c), the clerks of the transferor district courts receive a certified copy of the MDL-875 transfer order from the clerk of the transferee district, we request the transferor district clerks to notify the Clerk of the Panel of any actions on Schedule A in their districts that have been resolved or are in trial, so as to permit the Panel to issue a correction order excluding such actions from transfer. We also remind counsel in such actions of the requirements of Panel Rule 10(f):

> With respect to any action that is the subject of Panel consideration, counsel shall notify the Clerk of the Panel of

IT IS FURTHER ORDERED that Panel Rule 19(a) be, and the same hereby is, suspended for this docket.[12]

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any development that would partially or completely moot the matter before the Panel. Id. at 257.

[12]Panel Rule 19(a), id. at 263, requires clerks of transferor district courts to forward to the clerk of the transferee district court the complete original file and docket sheet for each transferred action. Because of the voluminous files in this docket, we are suspending this rule. Instead, we will rely on the judgment of the transferee judge to request from the transferor district clerks or the parties whatever case files and docket sheets he needs.

SUMMARY OF SCHEDULE A
DOCKET NO. 875
IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)

DISTRICT	# of CASES	DISTRICT	# OF CASES
AK.	6	MS., S.	997
AL., N.	58	MT.	79
AL., S.	64	NC., E.	83
AR., E.	75	NC., M.	27
AR., W.	18	NC., W.	126
AZ.	112	ND.	12
CA., C.	31	NE.	93
CA., E.	1	NH.	61
CA., N.	3	NJ.	147
CA., S.	4	NM.	63
CO.	4	NV.	22
CT.	345	NY., E.	425
DC.	32	NY., N.	589
DE.	16	NY., S.	1441
FL., M.	220	NY., W.	420
FL., N.	1	OH., N.	4022
FL., S.	135	OH., S.	84
GA., M.	39	OK., E.	2
GA., N.	180	OK., N.	538
GA., S.	673	OK., W.	17
HI.	105	OR.	75
IA., N.	19	PA., E.	5703
IA., S.	65	PA., N.	244
ID.	30	PA., W.	264
IL., C.	166	SC.	266
IL., N.	459	SD.	2
IL., S.	37	TN., E.	78

IN., N.	1	TN., M.	65
IN., S.	169	TN., W.	29
KS.	26	TX., E.	1165
KY., E.	48	TX., N.	34
KY., W.	64	TX., S.	477
LA., E.	163	TX., W.	24
LA., M.	89	UT.	21
LA., W.	48	VA., E.	618
MA.	2630	VA., W.	275
MD.	597	VI.	61
ME.	39	WA., E.	14
MI., E.	242	WA., W.	193
MI., W.	9	WI., W.	22
MN.	12	WV., N.	23
MO., E.	69	WV., S.	586
MO., W.	42	WY.	1
MS., N.	5		

TOTAL DISTRICTS: 87TOTAL TRANSFERS: 26,639

SCHEDULE A (Cont.) - MDL NO. 875 - P.98

DISTRICT	DIV.	CIVIL ACTION#
TX,E.	5	87-103
TX,E.	6	86-237
TX,E.	6	87-180
TX,E.	6	87-467
TX,E.	6	87-504
TX,E.	6	89-527
TX,E.	6	89-597
TX,E.	6	90-248
TX,E.	9	86-172
TX,E.	9	89-133
TX,E.	9	89-121
TX,E.	9	89-121
TX,E.	9	90-133
TEXAS NORTHERN		
TX.N.	2	90-85
TX.N.	2	90-140
TX.N.	2	90-163
TX.N.	2	90-202
TX.N.	3	86-926
TX.N.	3	88-955
TX.N.	3	86-2761
TX.N.	3	87-367
TX.N.	3	87-948
TX.N.	3	88-775
TX.N.	3	88-777
TX.N.	3	88-1234
TX.N.	3	89-71
TX.N.	3	89-138
TX.N.	3	89-139

DISTRICT	DIV	CIVIL ACTION#
TX,S.	3	88-5
TX,S.	3	88-11
TX,S.	3	88-12
TX,S.	3	88-77
TX,S.	3	88-102
TX,S.	3	88-115
TX,S.	3	88-125
TX,S.	3	88-126
TX,S.	3	88-128
TX,S.	3	88-146
TX,S.	3	88-149
TX,S.	3	88-149
TX,S.	3	88-153
TX,S.	3	88-154
TX,S.	3	88-160
TX,S.	3	88-163
TX,S.	3	88-172
TX,S.	3	88-178
TX,S.	3	88-185
TX,S.	3	88-191
TX,S.	3	88-207
TX,S.	3	88-208
TX,S.	3	88-212
TX,S.	3	88-947
TX,S.	3	89-243
TX,S.	3	89-269
TX,S.	3	89-342
TX,S.	3	90-39
TX,S.	3	90-109
TX,S.	4	82-2363

TX.N. 3 89-140
TX.N. 3 89-141
TX.N. 3 89-142
TX.N. 3 89-167
TX.N. 3 89-607
TX.N. 3 89-608
TX.N. 3 89-2133
TX.N. 3 89-2274
TX.N. 3 89-2634
TX.N. 3 89-2843
TX.N. 3 89-3232
TX.N. 3 90-2
TX.N. 3 90-423
TX.N. 3 90-751
TX.N. 3 90-1008
TX.N. 3 90-1209
TX.N. 3 90-1670
TX.N. 3 90-2246
TX.N. 3 90-2421

TEXAS SOUTHERN

TX.S. 3 83-77
TX.S. 3 83-183
TX.S. 3 85-222
TX.S. 3 85-513
TX.S. 3 87-72
TX.S. 3 87-212
TX.S. 3 87-369
TX.S. 3 87-381
TX.S. 3 87-382
TX.S. 3 87-383
TX.S. 3 87-384
TX.S. 3 87-408
TX.S. 3 87-409

TX,S. 4 82-2386
TX,S. 4 83-66
TX,S. 4 83-124
TX,S. 4 83-196
TX,S. 4 83-401
TX,S. 4 83-3470
TX,S. 4 83-5152
TX,S. 4 83-5882
TX,S. 4 83-6787
TX,S. 4 83-7104
TX,S. 4 84-103
TX,S. 4 84-254
TX,S. 4 84-1035
TX,S. 4 84-1085
TX,S. 4 84-1104
TX,S. 4 84-1105
TX,S. 4 84-1588
TX,S. 4 84-1719
TX,S. 4 84-1830
TX,S. 4 84-1984
TX,S. 4 84-1991
TX,S. 4 84-2036
TX,S. 4 84-2037
TX,S. 4 84-2075
TX,S. 4 84-2157
TX,S. 4 84-2296
TX,S. 4 84-2297
TX,S. 4 84-2473
TX,S. 4 84-2861
TX,S. 4 84-3050
TX,S. 4 84-3080
TX,S. 4 84-3117
TX,S. 4 84-3167
TX,S. 4 84-3260

TX.S. 4	84-3352	TX.S. 4	85-1968
TX.S. 4	84-3463	TX.S. 4	85-1969
TX.S. 4	84-3469	TX.S. 4	85-2032
TX.S. 4	84-3671	TX.S. 4	85-2045
TX.S. 4	84-3475	TX.S. 4	85-2096
TX.S. 4	84-3476	TX.S. 4	85-2098
TX.S. 4	84-3933	TX.S. 4	85-2643
TX.S. 4	84-3961	TX.S. 4	85-2644
TX.S. 4	84-3962	TX.S. 4	85-2645
TX.S. 4	85-30	TX.S. 4	85-2646
TX.S. 4	85-128	TX.S. 4	85-2647
TX.S. 4	85-169	TX.S. 4	85-2648
TX.S. 4	85-412	TX.S. 4	85-2649
TX.S. 4	85-819	TX.S. 4	85-2650
TX.S. 4	85-1432	TX.S. 4	85-2695
TX.S. 4	85-1562	TX.S. 4	85-2698
TX.S. 4	85-1563	TX.S. 4	85-2700
TX.S. 4	85-1564	TX.S. 4	85-2701
TX.S. 4	85-1565	TX.S. 4	85-2967
TX.S. 4	85-1566	TX.S. 4	85-3010
TX.S. 4	85-1567	TX.S. 4	85-3540
TX.S. 4	85-1577	TX.S. 4	85-3607
TX.S. 4	85-1578	TX.S. 4	85-3714
TX.S. 4	85-1579	TX.S. 4	85-4335
TX.S. 4	85-1580	TX.S. 4	85-4618
TX.S. 4	85-1581	TX.S. 4	85-4681
TX.S. 4	85-1583	TX.S. 4	85-6498
TX.S. 4	85-1587	TX.S. 4	85-6697
TX.S. 4	85-1588	TX.S. 4	86-146
TX.S. 4	85-1590	TX.S. 4	86-486
TX.S. 4	85-1591	TX.S. 4	86-640
TX.S. 4	85-1594	TX.S. 4	86-845
TX.S. 4	85-1595	TX.S. 4	86-848
TX.S. 4	85-1596	TX.S. 4	86-849

TX.S. 4	85-1597	TX.S. 4	86-878
TX.S. 4	85-1598	TX.S. 4	86-879
TX.S. 4	85-1599	TX.S. 4	86-899
TX.S. 4	85-1612	TX.S. 4	86-1608
TX.S. 4	85-1613	TX.S. 4	86-1610
TX.S. 4	85-1624	TX.S. 4	86-1667
TX.S. 4	85-1629	TX.S. 4	86-1728
TX.S. 4	85-1679	TX.S. 4	86-1729
TX.S. 4	85-1680	TX.S. 4	86-1768
TX.S. 4	85-1708	TX.S. 4	86-1780
TX.S. 4	85-1709	TX.S. 4	86-2123
TX.S. 4	85-1710	TX.S. 4	86-2139
TX.S. 4	85-1711	TX.S. 4	86-2141
TX.S. 4	85-1712	TX.S. 4	86-2143
TX.S. 4	85-1731	TX.S. 4	86-2164
TX.S. 4	85-1734	TX.S. 4	86-2204
TX.S. 4	85-1736	TX.S. 4	86-2285
TX.S. 4	85-1738	TX.S. 4	86-2308
TX.S. 4	85-1740	TX.S. 4	86-2338
TX.S. 4	85-1743	TX.S. 4	86-2487
TX.S. 4	85-1745	TX.S. 4	86-2576
TX.S. 4	85-1747	TX.S. 4	86-2577
TX.S. 4	85-1796	TX.S. 4	86-2578
TX.S. 4	85-1799	TX.S. 4	86-2579
TX.S. 4	85-1800	TX.S. 4	86-2580
TX.S. 4	85-1960	TX.S. 4	86-2581
TX.S. 4	85-1962	TX.S. 4	86-2625
TX.S. 4	85-1966	TX.S. 4	86-2661
TX.S. 4	85-1967	TX.S. 4	86-2667
TX.S. 4	86-2703	TX.S. 4	87-738
TX.S. 4	86-2748	TX.S. 4	87-739
TX.S. 4	86-2749	TX.S. 4	87-740
TX.S. 4	86-2846	TX.S. 4	87-809
TX.S. 4	86-2847	TX.S. 4	87-810

TX.S. 4	86-2848	TX.S. 4	87-811
TX.S. 4	86-2850	TX.S. 4	87-812
TX.S. 4	86-2851	TX.S. 4	87-813
TX.S. 4	86-2852	TX.S. 4	87-814
TX.S. 4	86-2853	TX.S. 4	87-815
TX.S. 4	86-2854	TX.S. 4	87-816
TX.S. 4	86-2855	TX.S. 4	87-817
TX.S. 4	86-2856	TX.S. 4	87-818
TX.S. 4	86-2858	TX.S. 4	87-819
TX.S. 4	86-2872	TX.S. 4	87-820
TX.S. 4	86-2971	TX.S. 4	87-821
TX.S. 4	86-2972	TX.S. 4	87-822
TX.S. 4	86-2973	TX.S. 4	87-823
TX.S. 4	86-2974	TX.S. 4	87-824
TX.S. 4	86-3055	TX.S. 4	87-825
TX.S. 4	86-3056	TX.S. 4	87-826
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(2)

No. 91-1366

In The

Supreme Court of the United States

October Term, 1991

JAMES M. DARTEZ, et al.,

Petitioners,

vs.

OWENS-ILLINOIS, INC. and
FIBREBOARD CORPORATION,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS RESTATED

1. May statements in submissions to a court by counsel for a party-litigant in one case, summarizing testimony of certain witnesses in that case, be used as "admissions" in another case involving different issues?

2. More specifically, where the first case seeks a declaration that a policyholder has insurance coverage for liabilities which are threatened but not established, may a litigant suing to impose the threatened liabilities in a second case employ testimony adduced in the coverage case, and particularly counsels' summary of such testimony, as evidence that the policyholder has admitted facts tending to establish that the policyholder is in fact liable to that litigant?

3. In the light of the foregoing, did the court of appeals reach the correct result when it refused to treat counsels' brief and synopsis of evidence in an insurance case as an "admission" in a different case, where any insurance established would provide coverage, mindful of: F.R.Civ.P. Rule 8 (allowing hypothetical and even inconsistent assertions by a party-litigant); F.R.Evid. Rule 403 (excluding even admissible evidence that would unduly consume time or cause unfair prejudice); F.R.Evid. Rule 411 (excluding the introduction of evidence of the fact of insurance as a way to influence the jury's determination of the insured's potential liability); and F.R.Evid. Rule 801(d)(2) (since "admissions" must be "assertions", the hypothetical and contingent assertion of coverage rights should not be interpreted as an "assertion" of facts establishing the liabilities for which coverage is sought)?

STATEMENT OF CORPORATE AFFILIATIONS

Fibreboard Corporation is a publicly held corporation whose stock is traded on the American Stock Exchange. It presently has no parent and no subsidiaries that are not wholly owned.

Owens-Illinois, Inc. is a publicly held corporation whose stock is traded on the New York Stock Exchange. It presently has no parent. Owens-Illinois, Inc. has an interest in the following subsidiaries that are not wholly owned:

Name	*State of Incorporation or Organization*
Owens-Illinois de Puerto Rico	Ohio
Cisper Industria e Comercio, S.A.	Brazil
Companhia Industrial Sao Paulo e Rio	Brazil
Cristaleria Peldar, S.A.	Columbia
Andividrios, S.A.	Ecuador
Cristaleria del Ecuador, S.A.	Ecuador
Fabrica de Vidrio Los Andes, C.A.	Venezuela
Manufacturera de Vidrios Planos, C.A.	Venezuela
Owens-Illinois de Venezuela, C.A.	Venezuela

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No. 91-1366

In The

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October Term, 1991

JAMES M. DARTEZ, et al.,

Petitioners,

vs.

OWENS-ILLINOIS, INC. and
FIBREBOARD CORPORATION,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR RESPONDENTS IN OPPOSITION[1]

STATEMENT OF THE CASE

A. Preface

Petitioners are five plaintiffs who seek to prove elements of their *prima facie* case for asbestos-related personal injuries by arguing to a jury that respondents have

[1] **N.B.**: The Petition is cited as "Pet. p. ___" and the Appendix as "App. ___a." All citations to "Rule ___" are to the Federal Rules of Evidence unless otherwise indicated. Certain Rules referenced in the Brief are printed in the Appendix, following the signature page. Usually, emphasis has been added in quoted materials.

"admitted" facts that petitioners want to prove. This situation arises because one of the respondents, Fibreboard Corporation, was forced to sue its carriers to obtain liability insurance coverage – including coverage for petitioners' own claims. In the insurance enforcement action, Fibreboard's lawyers filed written post-trial submissions synopsizing the testimony of witnesses adduced in that case. These witnesses described many attributes of asbestos in a general way, without reference to any particular individual. Some testified that asbestos-related illnesses are progressive. This general testimony about asbestos and asbestos-related disease was adduced in order to assist the court in construing the meaning of Fibreboard's insurance policies. *See, post,* Subhead C.

Having now sued Fibreboard for their claimed injuries, petitioners could call their own expert witnesses, or seek to prove in other ways that their own alleged asbestos illnesses will get worse over time.[2] But instead of doing so, petitioners wish to argue that, by canvassing testimony in the record of the insurance coverage trial, in post-trial briefs filed in that case, Fibreboard's lawyers have caused Fibreboard to "admit" that asbestos illnesses are in fact progressive. From this, petitioners wish to argue that their own alleged illnesses will get worse. In response to hearsay objections, petitioners contend that the lawyers' post-trial synopsis of the coverage trial record may be offered as evidence tending to show that asbestos-related illnesses are progressive. Petitioners

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[2] This petitioners admit. *See* Pet. p. 18.

invoke as authority Rule 801(d)(2), subparts (A) through (D).[3]

Every court of appeals considering the question has determined that briefs and pleadings in other cases are not to be routinely treated as Rule 801(d)(2) admissions. *Post*, 12-13. The Fifth Circuit *twice* addressed the basic issues of admissibility in petitioners' own cases and *twice* ruled against the petitioners. App. 4a, 14a. Treatment of briefs and related documents as "admissions" would stifle policyholder efforts at taming recalcitrant insurers: a suit to establish indemnity *in the event of liability* would transmogrify *into an admission of liability itself!* Ultimately, petitioners strive for a perverse construction of Rule 801(d)(2) and do not do justice to either the law or the record.

In sum, this Court should deny certiorari. The case does not merit review.

B. Battles Over Insurance: Theory and Reality Contrasted

More than twenty years ago, respondents manufactured and sold insulation products that contained asbestos.[4] As a result of those commercial activities,

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[3] Owens-Illinois, one of the two respondents in this case, was not a party to the subject insurance litigation and did not author or participate in any way in the submission of the post-trial briefs filed in that case.

[4] Fibreboard Corporation sold products containing asbestos for several years leading up to 1971, when it ceased doing so. Owens-Illinois, Inc. discontinued the sale of products containing asbestos in 1958.

respondents face thousands of claims brought by persons who contend that they suffer from bodily injury caused by inhaling asbestos fibers released by the respondents' products. App. 30a, n.2. Petitioners are five such bodily injury claimants who have filed suits against respondents in the District Court for the Eastern District of Texas. App. 1a, *et seq.*

Businesses have been admonished by courts to purchase liability insurance in order to socialize the costs of tort liability. *See, e.g., Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 462, 150 P.2d 436 (1944) (Traynor, J., concurring).[5] Under the archetype, a liability insurance policy furnishes the insured with indemnification for the insured's covered liabilities and a defense in any suit which *potentially* seeks damages within the coverage of the policy. *See generally Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 275, 419 P.2d 168, 54 Cal.Rptr. 104 (1966). Accordingly, when a policyholder faces a claim and possible liability that might fall within the coverage of an insurance policy, the claim is tendered to the insurer, who engages counsel and provides the insured with a defense. If the policyholder is exonerated of liability, the indemnification feature of the policy is of no moment. If the policyholder is found liable on a basis that is within the scope of the coverage set out in the insurance policy, the insurance company discharges the policyholder's liability up to the limits of the policy.

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[5] We invoke California authorities because the insurance coverage case which spawned the alleged Rule 801(d)(2) admissions was litigated in the California courts. *See, post*, p. 8.

Reality teaches that insurers very often deny or dispute coverage. When coverage is denied, the insured has several litigation options, though many are of cold comfort. For example, a policyholder may defer efforts to enforce coverage until after liability is imposed on the insured and the insurance company refuses to pay the liability. A cause of action for indemnity arises *after* liability is established; liabilities are what the policy indemnifies. *Cf. E. L. White, Inc. v. City of Huntington Beach*, 21 Cal.3d 497, 506, 579 P.2d 505, 146 Cal.Rptr. 614 (1978). Another theoretical option for the policyholder is to seek joinder by way of a third-party complaint for indemnity appended to the suit alleging that the insured faces liability.[6]

These and kindred avenues offer empty options because they delay a determination of the coverage issue, something that the insured can ill afford. So long as an insurance company denies coverage, the policyholder does not have either the prospect of future indemnification or the *more immediate* protection of an insurer-financed defense. In addition, so long as coverage is disclaimed, settlement of claims is impaired because there is uncertainty over whether insurance resources will be available to help the policyholder pay.

In order to mitigate these problems, the insured can (and usually must) file an immediate action for declaratory relief establishing coverage. As shown by

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[6] One complication with such a joinder is that courts are admonished not to disclose the existence of insurance or indemnification to the factfinder who considers whether there is liability. *See State Farm Ins. Co. v. Superior Court*, 47 Cal.2d 428, 432, 304 P.2d 13 (1956).

Fibreboard's case and the facts before the Court, such actions can be brought even before the extent of the insured's liabilities is known. *See, post,* Subhead C.

A declaratory relief action seeking coverage will often precede or run parallel with the so-called "underlying cases," where tort claimants seek to hold the policyholder liable to them. This phenomenon leaves some untidiness in the coverage case. The insurer's obligation to indemnify, like other indemnity obligations, depends on the existence of the policyholder's liability. The existence of policyholder liability to tort claimants is not known until a claimant obtains a judgment or settlement. Indeed, liability to some claimants may never materialize. Likewise, analyzing the existence of the insurer's duty to defend necessitates a look at the policyholder's *potential* liabilities, mindful that those liabilities will often be disputed and almost always unresolved. *See Gray, supra.*

The liability of the policyholder to the damage claimants is only obliquely in issue in the early-filed coverage suit that seeks declaratory relief. Because the exact shape and dimensions of the policyholder's eventual liabilities are unknown in such a case, there is an element of the hypothetical about the evidence and argument in that case. The court adjudicating coverage issues does not decide any aspect of the underlying cases by which claimants seek recovery from the policyholder.[7] However,

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[7] As the California trial judge explained in Fibreboard's coverage case, a subject to which we turn in the next section of the text, Subhead C, *post:*

(Continued on following page)

when coverage issues are litigated in an early-filed declaratory relief action, the court may wish to examine the liabilities asserted against the policyholder in order to properly interpret and apply the insurance policies. In essence, the *potential* liabilities are *previewed*. This *preview* occurs, not because the policyholder or the insurer believes that there should in fact be liability, but because, despite vigorous disclaimers and defenses, juries may yet impose liabilities.

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"These Phase III issues were raised in declaratory relief actions brought to determine the rights and obligations of insurers to indemnify and defend policyholders who are or were manufacturers or distributors of asbestos or asbestos products. Those policyholders are or have been defendants in tens of thousands of lawsuits brought by persons who claim to have developed disabling and often fatal asbestos-related diseases allegedly as a result of exposure to the policyholders' products many years ago.

"The issues involved in this coordinated proceeding do not concern the rights of those suffering from an asbestos-related disease to recover damages against one or more asbestos manufacturers. Those cases, sometimes referred to as the 'underlying injury' cases, are being tried and/or settled on a regular basis in other departments of this court and in numerous other courts throughout the United States." *In re Asbestos Insurance Coverage Cases*, S.F. Superior Court, No. 1072, Phase III Statement of Reasons for Decision, p. 5, *cited* Mealey's Litigation Reports; *Insurance*, Supp. to Vol. 4, Iss. No. 8 (2-27-90) (hereafter cited as "Mealey's, p. ___").

C. Fibreboard's California State Court Coverage Action

The immense financial burdens presented by the asbestos litigation forced Fibreboard to file a declaratory relief action in order to establish its coverage. And so, Fibreboard joined with several other companies and filed an action for declaratory relief, seeking to establish that asbestos bodily injury claims fall within the scope of coverage under liability insurance policies. App. 7a-8a. This was a vast coverage case involving many insureds, many insurers, and many policies; and the line-up of who insured whom for what varied year-by-year. Mealey's, pp. 1-3. Trial in the California Superior Court at San Francisco took months and covered a host of issues.[8]

Because the coverage case was so complex, the California court arranged the trial in phases. During Phase III, evidence was adduced about asbestos and its effects on the human body. Policyholders and insurers presented the testimony of expert witnesses who described in a general way asbestos and asbestos-related illnesses. This evidence was adduced in order to assist the trial court in construing the meaning of the insurance policies, thereby to decide whether all or some insurers must defend and indemnify policyholders on account of suits brought by bodily injury claimants. As the California trial court came to put it in the decision pertaining to this phase of the trial:

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[8] Judgment was eventually entered in favor of the policyholders, including Fibreboard, and various appeals are now pending in the California courts. Mealey's, pp. 49-50; Mealey's, Vol. 4, Iss. No. 12 (4-24-90), p. 14.

> "Without an understanding of the medical aspects, the operative [policy] words may well be defined but would remain meaningless for purposes of determining when coverage is triggered in lawsuits arising from exposure to asbestos." Mealey's, p. 23.

Following the evidentiary portion of the Phase III trial, the policyholders filed a brief entitled "Post-Trial Phase III Brief of Policyholders on the Medical Evidence" (Dec. 9, 1986), and "Policyholders' Proposed Medical Findings of Fact." The brief began with an introduction:

> "The purpose of this brief is to address the substance of the medical evidence offered during Phase III of this proceeding . . . the Phase III issues can be resolved without resort to that evidence. And even if the evidence is relevant for some limited purpose, it is not necessary for the Court to sit as a fact finder and attempt to weigh the evidence and judge the credibility of the witnesses."

The introduction section of the brief concludes:

> *"In summary, that evidence demonstrates:"*

Thereafter, the brief recounts testimony, complete with copious citation to the trial transcript. The policyholders' other written submission is also closely referenced to evidence adduced at the insurance coverage trial.[9]

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[9] These two lengthy submissions from the California coverage case were offered by petitioners at their most recent personal injury trial and admitted over objection as Exhibit 46A. They are found at Tabs 5A and 5B of the Record Excerpts

(Continued on following page)

As a result of the Phase III trial, the trial judge made certain determinations about asbestos-related illnesses. These were in keeping with the very limited and contingent nature of the issue before the court. The court determined that, as to bodily injury claims where policyholders *actually seek indemnity* from insurers, asbestos diseases are deemed to have "progressed" from the date of first exposure to asbestos. Mealey's, pp. 29-30. As noted earlier, the right to *indemnity* arises after *liability* is imposed. *See ante*, p. 5. Hence, the California court ruled that, if a policyholder is liable for a third person's asbestos illness, and therefore seeks indemnity, then, *for purposes of construing the terms of the insurance policies*, the third person's injury began with the first inhalation of asbestos and "progressed" thereafter. Mealey's, pp. 29-30; see also n.6, *ante*. This trial court determination bears most particularly on the coverage issue known as "trigger": as among many insurers with policies in force in different years, which insurers are liable to which policyholders for which years? Mealey's, pp. 13, 55.

D. Events Leading to the Judgments Below

Meanwhile, events moved from state court in San Francisco to federal court in Beaumont. There, the five

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filed with appellants' opening brief in the court of appeals. The quotations in text come from the insurance court brief. Petitioners published extracts of the coverage case documents to the jury and the extracts were admitted over objection as Exhibits 46 and 47. *See* App. 13a. The extracts are in the same Record Excerpts, Tabs 4A and 4B.

petitioners each filed suits claiming that they suffer from asbestos-related disease caused by respondents' products. Various causes of action under Texas law are asserted.

Round One: The case of petitioner Dartez was tried alone, appealed, and reversed by the Fifth Circuit. *See Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985). These proceedings are not relevant to this petition.

Round Two: On remand, Mr. Dartez' case was joined with four others and tried to a jury. The five plaintiffs (petitioners in this Court) put into evidence over objection excerpts from appellate court briefs filed in cases concerning insurance coverage for manufacturers of products that contained asbestos. Judgments were entered for petitioners. The Fifth Circuit reversed, concluding that the appellate court briefs were being offered as hearsay and did not constitute admissions under Rule 801(d)(2). App. 14a, *et seq.* Rehearing *en banc* was denied by the Fifth Circuit, 860 F.2d 437 (1988), and no review was sought in this Court.[10]

Round Three: On remand, petitioners recreated the error that occurred at the *Hardy* trial, this time offering the post-trial briefs filed in Fibreboard's California insurance coverage case. Once again, petitioners' argument was that the briefs are "admissions" under Rule 801(d)(2). The coverage court submissions in question are described in Section C, *ante*, and were marked as a trial

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[10] We refer to the second trial and appeal throughout this brief as the *Hardy* case.

exhibit. Excerpts were published to the jury and also marked. *See* note 9, *ante*.

On appeal, the Fifth Circuit again reversed, relying not only on the reasoning of the *Hardy* opinion but also on law of the case principles. App. 4a, *et seq*. Once again, rehearing *en banc* was denied; no judge called for a poll of the full Fifth Circuit. App. 28a.

Petitioners now seek certiorari.

REASONS TO DENY THE WRIT

This case does not merit review under any of the standards set out in this Court's Rule 10.1(a). The decision of the court of appeals is right for a number of reasons. Moreover, there are prudential reasons to deny the writ. We elaborate below.

A. There Is No Conflict in the Decisional Law

There is no conflict among the circuits on any issue decided by the Fifth Circuit in either the *Hardy* or *Dartez* opinions. On the contrary, all of the reported decisions share the *Hardy-Dartez* view that (1) briefs and other documents canvassing a court record are generally not Rule 801(d)(2) admissions, and (2) documents filed in actions for indemnity or insurance should rarely, if ever, be viewed as admissions in later liability cases.[11]

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[11] *Continental Ins. Co. of New York v. Sherman*, 439 F.2d 1294 (5th Cir. 1971); *Kassel v. Gannett Co.*, 875 F.2d 935 (1st Cir. 1989);

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Petitioners do not contest the lack of a decisional conflict, suggesting instead that certiorari is necessary because circuit uniformity shows pervasive error. Pet. pp. 9-10, 16, 18.[12] Such an argument misperceives the role of this Court. Certiorari jurisdiction is employed to restore uniformity in the law or to settle important questions of federal law. *See* S.Ct. Rule 10.1(a). When the circuit courts consistently adopt the same interpretation of a rule, there is no disagreement to settle. The fact that lower court judges all reason to the same result under a rule or statute suggests that the rule is straightforward and thus unworthy of this Court's attention.

B. There Is No Occasion for an Exercise of the Court's Supervisory Powers

The Fifth Circuit did not depart "from the accepted and usual course of judicial proceedings . . . [so] as to call for an exercise of this Court's power of supervision." *See*

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Vincent v. Louis Marx & Co., 874 F.2d 36 (1st Cir. 1989); *Whatley v. Armstrong World Industries, Inc.*, 861 F.2d 837 (5th Cir. 1988); *McNeese v. Reading & Bates Drilling Co.*, 749 F.2d 270 (5th Cir. 1985); *Oki America, Inc. v. Microtech Int'l Inc.*, 872 F.2d 312 (9th Cir. 1989); *see also Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349 (5th Cir. 1983); *Douglas Equipment, Inc. v. Mack Trucks, Inc.*, 471 F.2d 222, 224 (7th Cir. 1972); *Taylor v. Allis-Chalmers Mfg.*, 320 F.Supp. 1381 (E.D. Pa. 1969), *aff'd* 436 F.2d 416 (3d Cir. 1970).

[12] For good measure, petitioners also smuggle into their petition arguments that the Fifth Circuit has misconstrued Rule 702, Pet. pp. 8-10, and Rule 403, both generally, Pet. p. 17, and in the *Sanford* decision. *See* Pet. pp. 17-18. None of this is relevant to the "Questions Presented" by petitioner.

S.Ct. Rule 10.1(a). There are at least five reasons to conclude that the result *twice reached* by the court of appeals is indubitably correct and that the case does not in any event qualify for review under the Court's certiorari jurisdiction.

First. Petitioners' arguments are quite beside the point in the light of the record of this case. The improperly admitted exhibits recite the testimony of medical expert witnesses who testified at the trial of the California insurance coverage case. Rule 801(d)(2) would not allow petitioners to read trial transcripts of expert testimony from the insurance coverage trial at their personal injury trial. No argument found in the petition suggests otherwise. It follows that the testimony and opinions of insurance trial witnesses do not become admissible in the personal injury case simply because such testimony is read from a lawyer's post-trial synopsis rather than from the coverage trial transcript. Testimony given by witnesses, even witnesses called by a party, is not "admitted" by the party under Rule 801(d)(2). *See Fox, supra,* 694 F.2d at 1355.

Second. Petitioners' arguments rest on an unsound premise. The Federal Rules of Evidence do not repudiate the principles of evidence forged by the common law.

> "It is clear that in enacting the Federal Rules of Evidence Congress did not intend to wipe out the years of common law development in the field of evidence, indeed the contrary is true. The new rules contain many gaps and omissions and in order to answer these unresolved questions courts certainly should rely on common

> law precedent. See Redden & Saltzberg, *Federal Rules of Evidence Manual* 411-413 (1975)."

Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir.1980), *cert. denied*, 449 U.S. 1080 (1981).

Petitioners speak of Congress' desire for uniform rules of evidence to replace the common law patchwork. Pet. p. 15. But such desires do not mean that Congress burned all bridges to our common law heritage or that the advent of codified rules obliterates prior conventions. The problem with the common law is usually not dissatisfaction with its content but the lack of an easily useable compilation.

Illustrating, the hearsay rules were generally intended to be based on common law precepts, a point made by the Advisory Committee on the Rules of Evidence:[13]

> "The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified

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[13] F.R.Evid., Article VIII, Notes of Advisory Committee on Proposed Rules, Introductory Note, The Hearsay Problem.

> exceptions 'but having comparable circumstantial guarantees of trustworthiness.' Rules 803(24) and 804(b)(6). This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future."

Note, interestingly, the desire to stimulate growth and development in the law relating to hearsay. Such objectives could not be promoted if the Rules are construed as a tightly laced corset of the kind petitioners don.

Petitioners themselves *admit* that the Fifth Circuit's rulings in this case are rooted in common law, pre-Rule decisions. Pet. p. 14. Thus, unless it can be said that Rule 801(d)(2) uprooted and replaced the common law leading up to its enactment, the case is over, for the Fifth Circuit's decision rests soundly in common law precedent; even petitioners seem to agree.

Petitioners argue that Rule 402 does not make room for use of common law principles as a basis to exclude evidence.[14] Pet. pp. 15-16. This misses the mark. The issue

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[14] Admission of the post-trial brief excerpts was inappropriate and particularly prejudicial as to Owens-Illinois. It is undisputed that Owens-Illinois was neither a party to nor a participant in the California insurance litigation; thus, Owens-Illinois could not have "admitted" anything contained in the briefs, even under petitioners' distorted interpretation of the law. Although the "admissions" were purportedly offered only against Fibreboard and another defendant, not a party to this appeal, the "evidence" had its intended prejudicial impact on all defendants, including Owens-Illinois. *Compare Dartez* opinion App. 13a *and* Amended Final Judgment in *Dartez*, App. 20a, *with* Rules 402 and 403.

is whether the Rules of Evidence bar use of prior precedent as a tool to understanding the words used in the Rules themselves. Petitioners offer nothing to suggest that Congress had the intent to erase prior precedents as interpretive guides. As petitioners themselves concede, these precedents support the decisions of the court of appeals.

Third. Far from what petitioners contend, the Fifth Circuit's analysis comports with the "plain meaning" of Rule 801(d)(2). Petitioners' enchantment with plain meaning ignores the pivotal words. The proper language need only be parsed, an exercise nowhere attempted in the petition.

Each of the subparts of Rule 801(d)(2) refers to a "statement." A "statement" is defined in Rule 801(a) as:

> "(1) an oral or written *assertion* or (2) nonverbal conduct of a person if it is intended by the person as an *assertion.*"

The lawyer-briefwriter who canvasses the record of evidence adduced in a case has *at most* made a *statement* or *assertion* about *what the record shows*. Petitioners are attempting to take the *statement* or *assertion* about the content of the record and characterize it as a *statement* or *assertion* about the progressiveness of asbestos-related diseases. The Fifth Circuit holds that statements in briefs are not assertions of the truth of the facts which the briefs summarize, and therefore, not admissions within the meaning of Rule 801(d)(2). *See* App. 9a-10a, 21a-23a. This is consistent with the requirement of the rule that an admission must be an assertion by which the speaker intended to be bound.

We may assume for these purposes that written or spoken words are used to "assert" *something*. But that begs the question which must be addressed in order to decide if the words constitute an admission as to what the facts of a case may be. Words written and filed with a court are not invariably tendered in order to assert one's view of the facts. Counsel and litigants in any court have a responsibility to characterize the record even though the record may deviate from their own preferred perception of what is true. In the same vein, repetition of what another person has said is not necessarily an assertion of anything more than that it was said.

Petitioners chide the Fifth Circuit for engrafting onto Rule 801(d)(2) the requirement that an admission refer to "real world facts," "record facts," or "highly unusual facts." Pet. p. 14. They protest that Rule 801(d)(2) states no such limitations. Pet. p. 14. But an *assertion* is required.[15] The Fifth Circuit's analysis is sound because it is rooted in the notion of an assertion and the need to address the question of *what* is being asserted by the speaker. If evidence is offered to prove a fact on the basis that there has been an admission, but the speaker did not utter the words in order to assert such a fact, the admission rules should not carry the proffered evidence past legitimate hearsay objections.

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[15] Petitioners' own interpretation of Rule 801(d)(2) notes that "admissions" are "*assertions* in pleadings, briefs, correspondence, or those made in connection with any other judicial activity." Pet. p. 14. Petitioners continue: "[t]o satisfy the Rule, all that is required is an *assertion* in an individual or representative capacity." Pet. p. 14.

Wigmore[16] makes these points forcefully, and repeatedly, in the part of his treatise dealing with admissions:

> *"a concession which is hypothetical or conditional only can never be interpreted as an assertion* representing the party's actual belief, and therefore cannot be an admission . . . " § 1061, p. 34. (Emphasis in original).

Again, when explaining why settlement offers are not admissions, Wigmore notes:

> "By this theory the offer is excluded because, as a matter of interpretation or inference, it does not signify an admission at all. There is no concession of claim to be found in it, expressly or by implication." § 1061, p. 36.

And again, on the subject of hypothetical pleadings, Wigmore says:

> "A pleading, or other litigious allegation (such as a plea of *nolo contendere* or a *case stated*), may be in its terms merely *hypothetical* or ambiguous, and may therefore *not* be interpretable as an admission." § 1066, p. 81. (Emphasis in original).

Fourth. At bottom, petitioners' blunderbuss approach to defining "an admission" is unsound. What passes for petitioners' analysis of the "plain meaning" of Rule 801(d)(2) is both incomplete and superficial. As to Subparts (A), (C), and (D) of the Rule, petitioners claim that briefs are admissions because (and ultimately only because) the briefs were submitted on Fibreboard's behalf by attorneys for Fibreboard and other manufacturers. Pet.

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[16] 4 Wigmore, Evidence in Trials at Common Law (Chadbourn rev. 1972).

pp. 12-13. Such a simplistic rule makes everything written by a lawyer a client's admission of facts probative of the issues to be decided by the trier of fact, no matter the intention that lay behind the making of the lawyer's statement. But such a rule takes no account of context or situation, and that is its sterling vice.

As for Rule 801(d)(2)(B), petitioners are guilty of misstatement. They say: "The briefs were offered to persuade the court to render a multi-billion-dollar judgment for movants . . . " Pet. pp. 12-13. On this basis, the contention is pressed that Fibreboard manifested a belief in the truth of the insurance coverage trial testimony that suggests that asbestos-related diseases are progressive. Pet. pp. 12-13.

The fact is that the briefs were filed as part of the effort to secure a declaratory judgment that Fibreboard's insurers must defend and indemnify it. *Ante*, p. 8. The insurance case exhibits themselves belie the admission classification. Fibreboard contended that medical evidence concerning asbestos-related diseases was irrelevant to the proper interpretation of the rights and duties of the insurance companies. *See ante*, p. 9. Respondents' characterization of the experts' testimony was a contingent submission, relevant only if the California trial court thought it necessary to explore the matter in order to better understand and construe the wordings of the insurance policies.

Moreover, the implication that coverage litigation is a policyholder's profitable reward for accepting the albatross status of a mass tort defendant is surreal. And the view overlooks that, particularly as to the indemnity

feature of insurance coverage, the policyholder is protecting the tort plaintiffs' interests in recovery as much as personal interests in indemnity. This is especially true in so-called mass tort cases. One of the many unfortunate realities of asbestos litigation is the shortfall between the resources of the respondents (and others in their positions) and the compensation demands of claimants. *See* App. 38a.

Fifth. Petitioners' proposed interpretation of Rule 801(d)(2) cuts deeply against the grain of federal practice principles, and is blind to the litigation position of a policyholder who is suing for coverage. Contingent, hypothetical, and even inconsistent assertions in pleadings are not only authorized, but encouraged, per F.R.Civ.P. Rule 8(e)(2).[17] Such contingent assertions are not evidentiary admissions. *See Continental Ins. Co., supra,* 439 F.2d at 1298. No litigant who seeks insurance with which to pay or defend claims for damages has done anything more than say, "If I owe money to A, then B must defend and indemnify me." Allegations of that sort are not "sharp practices" or "abuse of the court system"[18] and they do not constitute "admissions" that A is owed anything at all.

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[17] While petitioners complain that "[d]efendants are permitted to create hypothetical fact situations as they see fit," Pet. p. 19, this assumes the point in contention, namely, that a brief which summarizes evidence amounts to sponsorship of the views of the witnesses whose testimony is summarized. Moreover, indemnity and coverage are all that was sought in the California trial. Those are quintessential examples of contingent and hypothetical allegations.

[18] See Pet. p. 19. *United States v. McKeon,* 738 F.2d 26, 31 (2d Cir. 1984), Pet. p. 19, has no bearing here.

Moreover, the litigation of coverage issues, particularly when presented by a declaratory relief action, does not require the court to decide any issue in the underlying personal injury cases, only understand what may possibly come of those cases by way of eventual judgment. Hence, the nature of policyholder efforts to establish coverage is inherently in conflict with the proposition that the policyholder is out to assert a position tending to establish the existence of *bona fide* liabilities.

C. There Are Independent Grounds Necessitating the Decision Rendered by the Fifth Circuit

Certiorari should be denied because the Fifth Circuit reached the right result even if one assumes that it traversed the wrong analytical road in its treatment of Rule 801(d)(2). These other grounds for affirmance are disclosed by the record and were the basis of objections tendered in the district court.[19]

In both the *Dartez* and *Hardy* opinions, the court of appeals expressly found that Fibreboard's insurance coverage submissions were "bound to confuse the jury, who could not easily grasp the difference between the proof necessary to establish general insurance coverage for asbestos exposure injuries and that necessary to show whether these plaintiffs' individual conditions had or might progress ineluctably." App. 13a; *see also* App. 26a.[20]

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[19] Respondents filed written objections to the subject insurance coverage materials. These are bound at Tab 6 of Respondents' Record Excerpts in the court of appeals.

[20] Thus, petitioners misstate the decisions of the court of appeals when they say that the court found the briefs to be relevant. Pet. p. 13.

This determination furnishes two additional bases on which it must be said the judgment of the court of appeals is correct.

First, the quoted finding tracks language in Rule 403, which authorizes the exclusion of relevant and admissible evidence when such evidence will confuse or mislead the jury. *Even if* the insurance submissions are admissible under Rule 801(d)(2), the record lays the foundation for exclusion under Rule 403.[21]

Second, and relatedly, a special problem arises if insurance coverage briefs are received in evidence as admissions. Respondents cannot explain the context of the supposedly admitted facts without drawing the jury's attention to the existence of insurance and the prospect that respondents may be indemnified for the amount of any judgment awarded by the jury. This is not only a jury confusion problem under Rule 403. Rule 411 provides in part:

> "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully."

Petitioners' proposed definition of an admission is ultimately a cleverly disguised bootstrap. The jury would be

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[21] Petitioners contend that Rule 801 is a specific rule, that Rule 403 is a general rule, that the specific controls over the general, and that judges may not exclude evidence of Rule 801(d)(2) without making a case-by-case assessments of the prejudice and confusion created by certain admissions. Pet. p. 17. Rules 801(d)(2) and 403 are complementary. Rule 801(d)(2) addresses admissibility. Rule 403 envisions the exclusion of even admissible evidence. There is no conflict, and no edict in Rule 801 preventing Rule 403 balancing.

forced to consider insurance in order to decide whether the policyholder has admitted facts tending to show liability or whether the insured has only made contingent assertions in order to secure coverage. Assuming a jury could discern the subtlety, the jury would be using the issue of insurance coverage as a basis to form a conclusion about liability facts. This is what Rule 411 forbids.

D. Prudential Considerations Counsel Against Review

First. The grant of certiorari to review the questions presented by petitioners would reward tactics which produce judicial waste. If the Fifth Circuit erroneously excluded briefs based on a misinterpretation of Rule 801(d)(2), it did so in *Hardy*. *Dartez* simply enforces the *Hardy* decision. *Dartez* was squarely based on law of the case principles *as well as* analysis of evidentiary principles. If certiorari had been sought, and petitioners' arguments vindicated in *Hardy*, the basis for the Fifth Circuit's reversal in *Hardy* would have disappeared. Yet petitioners did not seek certiorari following the *Hardy* decision. Petitioners went back to the district court for another trial and successfully recreated error by introducing into evidence still more briefs. As before, these briefs were offered as Rule 801(d)(2) admissions. On the respondents' inevitable appeal, the Fifth Circuit found that *Hardy* was controlling and the binding law of the case. App. 9a-12a.

We do not suggest that the doctrine of law of the case would foreclose this Court's review. In this Court, our argument is addressed to judicial discretion. The doctrine of law of the case fosters the important goal of judicial

finality. As the Court said earlier this Term, albeit in a much different setting:

> "prior rulings . . . should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 796 (1992) (citations omitted).

The grant of certiorari now will only reward tactics which relegate the third *Dartez* trial and the third *Dartez* appeal to the status of perfunctory stage-setting made necessary in order to present a certiorari petition on an issue that could have, and on these facts should have, been presented long ago.[22] Petitioners simply do not address those aspects of the law of the case doctrine relevant in this Court. They offer no explanation for their failure to seek certiorari in *Hardy*.

Second. While petitioners dilate over the problems presented to the court system by asbestos litigation, the peculiarities of this litigation counsel against both the grant of certiorari and the rule of law that petitioners crave.

For all petitioners' lament about the unsatisfactory state of asbestos litigation in the courts, petitioners choose not to mention the conclusion of the *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*,

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[22] No development post-dating the *Hardy* decision makes a petition for certiorari more propitious now than before.

4 (1991), namely, that solutions must come from Congress. *See also* App. 39a. Petitioners' argument that the outcome of this case might help solve the nettlesome problems posed by asbestos litigation is a pure form of wishful thinking.

Some repetition is inevitable in asbestos litigation because some issues are bound to be similar. The asbestos litigation problems that petitioners catalogue result from the large numbers of cases. Pet. p. 18. Only expediency would make the number of pending cases relevant to the issue of the admissibility of certain kinds of evidence. Moreover, even if insurance briefs are made admissible to prove policyholder liability, this will not lead to shortened trials. Trials will likely be longer because respondents will be forced to put the insurance briefs into context. This case addresses the admissibility of a type of evidence, not the termination of respondents' right to defend as to certain issues or facts.[23] While courts of appeals have discussed characteristics of asbestos and asbestos illnesses based on the records before them, Pet. p. 18, these same courts have spurned efforts to declare the facts surrounding asbestos settled for future cases. *See Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 345-46 (5th Cir. 1982) (no collateral estoppel); *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1981) (record does not show asbestos hazards as a matter of law).

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[23] In addition, the so-called admissions at issue in this case would be insufficient to prove any fact with respect to respondent Owens-Illinois or any other defendants not party to the California insurance litigation.

Even if the proper battleground for analysis is "expediency," petitioners are short-sighted. How will claimants be paid if balking insurers are not held to account for their promises of indemnity? Policyholder efforts to harness insurance resources should be encouraged rather than discouraged.

E. Petitioners' Invocation of Due Process and the Constitution Is Extraneous to the Issues and Frivolous

Petitioners' constitutional arguments do not seem to have anything to do with the questions presented for review. The insurance trial exhibits either are or are not admissible. If they are inadmissible under the laws of evidence, no aspect of the Due Process Clause guarantees admissibility.

The court of appeals had jurisdiction and judicial power to rule on the admissibility of the insurance coverage exhibits. In so ruling, the Fifth Circuit has *construed* the Rules of Evidence, not *amended* them. *Compare* Pet. pp. 21-23.

Finally, constitutional principles have nothing to do with the law of the case issue as it arises before this Court.

There is no constitutional question legitimately tendered by this case. The array of factually inapposite citations collected as part of petitioners' constitutional catharsis, Pet. pp. 21-23, shows that discussion to be either irrelevant or frivolous.

CONCLUSION

If petitioners have valid claims against the respondents, they stand to benefit from insurance coverage established by the respondents. No rule of evidence should allow an insured's efforts to secure the benefits of insurance to be transformed into a basis to hold the insured liable, and thus in need of insurance. No "admission" was made in the process of seeking insurance. None arose when witnesses testified on coverage issues. None occurred when lawyers summarized and briefed the testimony of those witnesses. The court of appeals reached the right result based on a proper construction of the Federal Rules of Evidence. No issue necessitates an exercise of this Court's jurisdiction.

Certiorari should be denied.

DATED: April 30, 1992

Respectfully submitted,

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APPENDIX

F.R.Civ.P. Rule 8(e) and (f):

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice. (As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

* * *

F.R.Evid. Rule 403:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

* * *

F.R.Evid. Rule 411:

Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. (As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

(3)

Supreme Court, U.S.
FILED
MAY 28 1992
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No. 91-1366

In The

Supreme Court of the United States

October Term, 1991

JAMES M. DARTEZ, RICHARD C. SMITH, SR., WILLIAM B. HARDY, CECIL OVERSTREET and JOHN D. BURKE,

Petitioners,

v.

OWENS-ILLINOIS, INC. and FIBREBOARD CORPORATION,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

REASONS FOR THE REPLY

There is a recurring theme in Respondents' brief that suggests that exceptions to the Federal Rules of Evidence should be made for litigation involving insurance. Indeed, Respondents' conclusion states, "No rule of evidence should allow an insured's efforts to secure insurance to be transformed into a basis to hold the insured liable . . . " (Brief 28). The reasons assigned for this unusual idea require this Reply.

The truth of the evidence in question has not been disputed by Fibreboard. On the contrary, it concedes three important points: 1. that it offered evidence about

asbestos and its effects on the human body (Brief p. 8); 2. the evidence was offered "in order to assist the [California] court in construing the meaning of Fibreboard's insurance policies." (Brief p. 2); and, 3. the evidence and the law entitled Fibreboard to judgment in its favor. (Brief p. 8, footnote 8). There was no suggestion that the evidence was hypothetical or in the alternative.

The evidence on the effects of asbestos on the human body was germane to the issues tried below, product exposure, producing cause, and compensatory damages.

Fibreboard's troubles with insurance companies and "immense financial burdens" is a sympathetic appeal but provides no basis for disregarding the plain meaning of Fed. R. Evid. 801(d)(2).

REPLY TO RESPONDENTS' ARGUMENT

A. The Lack Of Conflict Question

Pre-Rules decisional law is relevant only if there is an ambiguity in Fed. R. Evid. 801. If there is no ambiguity, the plain meaning of the rule controls.

However, pre-Rules decisional law supports Petitioners' position. Respondents cite dictum from *Continental Ins. Co. of New York v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971), but the holding, at page 1300, is quite different: "In light of the fact that Continental is now again in the case as a party defendant in Coates & Dorsey's action for indemnification, its original complaint . . . is admissible as an admission . . . " The *Hardy* and *Dartez* decisions conflict with Rule 801 and the Fifth Circuit's prior decision. The decisions are not supported by either statutory or common law. The Fifth Circuit "departed from the accepted and usual course of judicial proceedings" invoking the provisions of S.Ct. Rule 10.1(a).

B. Respondents' "Reasons" Demonstrate The Basic Misconception Of The Evidence And The Rule Necessitating This Court's Intervention

Respondents assign reasons to explain their contention that the Fifth Circuit did not depart "from the accepted and usual course of judicial proceedings" provision of S.Ct. Rule 10.1(a). Analysis of the "reasons" exposes their flaws.

FIRST: Respondents claim that the exhibits recited testimony of medical witnesses in California. Not true! The exhibits recited facts urged by Fibreboard in its argument for judgment. Fibreboard adopted selected facts and used them to persuade the California court to render judgment for it. They were classic adoptive admissions.

SECOND: The words of Fed. R. Evid. 801 are common words easily understood. They require no construction in and of themselves, and Congress has provided any needed definitions. The problem arises when the Fifth Circuit grafted exceptions onto Rule 801 when it had no authority to do so.

THIRD: Respondents' argument that the admissions in question were not "assertions" is refuted by the plain meaning of Fed. R. Evid. 801 and the circumstances under which the admissions were made. They were made in a court of law, by duly authorized attorneys "in order to assist the court in construing the meaning of Fibreboard's insurance policies." (Brief 2). Fibreboard is less than candid if it now suggests that it did not **intend** to make the statements that were part of the factual basis supporting the judgment it received.

FOURTH: The evidence in question came from Fibreboard's proposed medical findings of fact[1] and post-trial brief on the medical evidence[2] submitted to the court

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[1] Respondents' record excerpts, Tab 5A.

[2] Respondents' record excerpts, Tab 5B.

in California. Although supported by their expert witnesses, the statements were those of Fibreboard and the other policyholders. For example, on page 8 of the post-trial brief, Fibreboard stated "The *only* conclusion that can be drawn from the medical evidence is the conclusion that is virtually uniform in the medical literature – asbestos-related injuries are the result of a continuous process, beginning with first exposure and continuing through clinical manifestation." Having obtained judgment for a multi-billion dollar benefit, Fibreboard is now estopped to claim it did not intend to be bound by the statements.

Respondents declare that Petitioners are guilty of misstatement in representing to this Court, "The briefs were offered to persuade the court to render a multi-billion-dollar judgment for movants . . . (Pet. 12-13)." (Brief 20). Petitioners' assertion was confirmed April 2, 1992, when Fibreboard's attorneys FAXed a news release to Petitioners' counsel. The news release reported that Fibreboard had settled with one insurance company for approximately $360 million dollars, (Reply App. 3) and that if its appeals were successful "Fibreboard believes it will ultimately receive insurance resources of $1.584 billion . . . " (Reply App. 5) Fibreboard was only one of several manufacturers that received similar benefits based on statements it made in the California litigation. Petitioners still contend that Fibreboard believed in the truth of the evidence in question, and that, having been offered in a court of law to induce a judge to act, the statements carry the highest credibility.

Respondents' plea that Fibreboard was protecting plaintiffs' interests (Brief 21) rings hollow when the record reflects the opposite. The contention provides no justification for disregarding Fed. R. Evid. 801.

FIFTH: Respondents' fifth argument is overly simplistic if not misleading. If adopted, it would create much mischief for litigants for a long time. Respondents imply that federal practice permits litigants to change facts

depending upon whether a benefit is to be derived or a detriment incurred. Such is prohibited by Fed. R. Civ. P. 11. Harm has been done to Petitioners. Unless this Court grants relief, the harm will be magnified and multiplied many fold.

Respondents' fifth argument is flawed because the evidence in question did not come from a "pleading" as defined by Fed. R. Civ. P. 8. Under Rule 8, a "pleading" initiates or answers a lawsuit. The Rule dictates " . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . " The evidence in question came from instruments summarizing Fibreboard's position on the pathogenesis of asbestos-related diseases. The instruments in question were not "pleadings" as defined by Rule 8. Therefore, Respondents' argument about contingent, hypothetical, or inconsistent assertions in "pleadings" is not relevant.

Petitioners have no quarrel with Fed. R. Civ. P. 8(e)(2) permitting alternative or hypothetical pleadings because subsection 2 is made subject to Fed. R. Civ. P. 11 requiring that the allegations be "well grounded in fact . . . " The instruments in question set forth facts that Fibreboard believed entitled it to judgment.

Petitioners are not blind to Fibreboard's litigation position in California. In that litigation Fibreboard sought to stack insurance policies going back decades. It wanted insurance coverage to cover the period from a claimant's **first** exposure, throughout the latency period, and beyond. Fibreboard argued to the California court:

> . . . When *Borel*[3] was decided, however, the insurers recognized that asbestos bodily injury cases were precisely the type of latent disease cases that triggered coverage throughout the period of exposure and beyond.

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[3] *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974)

> The *Borel* decision contains an explicit description of the pathogenesis of asbestosis and other asbestos-related diseases that **is not only acccurate**, but that the insurance industry for years accepted as accurate, until it fully realized the financial ramifications of their coverage commitments after asbestos-related claims began to multiply . . . [4] (Emphasis added)

To stack the insurance policies, or implicate multiple policies, Fibreboard had to prove the pathogenesis of asbestos-related diseases. The pathogenesis of asbestos-related diseases triggered multiple insurance policies. It also aided the court and jury in Texas in understanding the medical results of exposure to asbestos.

Respondents' argument about asserting a position to establish the existence of bona fide liabilities is not relevant. Fibreboard stipulated defectiveness of the products, and the cases were tried on damage issues, product exposure, producing cause, and quantum. Petitioners' evidence was not offered for the purpose Fibreboard implies.

C. Respondents' "Independent Grounds" Do Not Withstand Analysis

The flaw in Respondents' argument is the fact that the juries in *Hardy* and *Dartez* were not called upon to "grasp the difference between the proof necessary to establish general insurance coverage for asbestos exposure injuries and that necessary to show whether these plaintiffs' individual conditions had or might progress ineluctably." Pet. App. 13a (Resp. Brief 22). This simple fact also discloses the flaw and the harm in the Fifth Circuit's opinions in both *Dartez* (Pet. App. 13a) and *Hardy* (Pet. App. 22a).

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[4] Post-Trial Phase III Brief of Policyholders on Trigger of Coverage (Petitioners' Record Excerpts, Tab 1, p. 61)

Both the Fifth Circuit and Respondents imply that the jury knew that Fibreboard had filed briefs in an insurance coverage case. Such was not the case. The exhibits that the jury saw were Petitioners' exhibits 46 and 47.[5] The exhibits were identified only as "Statements Filed In the Superior Court of California" on certain dates by named manufacturers, including Fibreboard. The complete briefs, in both *Hardy* and *Dartez*, were before the trial court only. How the Fifth Circuit could conclude that the jury was confused by evidence it did not have is a mystery. But it certainly raises due process questions when an appellate court denies Petitioners their judgment based upon such a conclusion.

There is further error. The Fifth Circuit's decision changed the burden of proof in favor of Fibreboard. Respondent was relieved of its burden to explain the unexplainable. The pathogenesis of asbestos-related diseases in human beings is the same in Texas as it is in California. Fed. R. Evid. 403 is not applicable to these cases. A jury cannot be incurably prejudiced by evidence that it did not have to review.

Respondents' argument about the interaction of Fed. R. Evid. 403 and 411 is simply a red herring. There was no evidence of insurance before the jury, and the liability issues (i.e., defectiveness of the products) had been taken out of the case by stipulation. Respondents charge Petitioners misstated the opinion below. (Respondents' brief, page 22, footnote 20). The precise language in the opinion was " . . . **These 'admissions' appeared both to support plaintiffs' contention** that their conditions were going to worsen **and to contradict the manufacturers' defense** that these plaintiffs were unlikely to contract the diseases in issue." (Pet. App. 13a, emphasis added). Petitioners continue to believe this means relevant and probative.

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[5] Respondents' record excerpts in the Fifth Circuit, Tabs 4A and 4B.

D. The Implications Of This Case Warrant This Court's Review

First: Respondents' argument that the law of the case doctrine should be invoked to punish Petitioners for judicial waste glosses over the due process infirmities of the *Hardy* decision. Further, Petitioners did not believe the case was ripe for consideration by the Supreme Court.

In *Hardy*, the Fifth Circuit made a point of stressing the difference between factual allegations in trial court pleadings (Pet. App. 21a) and statements in appellate briefs (Pet. App. 22a) pointing out that "Appellate briefs may not properly purport to be statements of what the real world facts are, but must rather be statements of what the trial court record reflects. *The distinction here is crucial.*" (Pet. App. 22a – emphasis in the original). With this distinction in mind, Petitioners examined defendants' statements at the trial court level to see what the defendants were saying there. It turned out that the pathogenesis of asbestos-related diseases was described the same at the trial court level as it was in the *Hardy* appellate briefs, only in more detail. But, until the trial-court-level exception was explored, Petitioners did not feel that the case was ripe for this Court to consider. With this loose end dangling, Petitioners felt there was a substantial risk that this Court would deny certiorari, forever sealing the matter.

The *Hardy* decision was void because it deprived Petitioners of due process. Petitioners did not receive the benefit of the basic requirements of justice outlined in Fed. R. Evid. 102 – fairness in administration of the law, elimination of unjustifiable expense, truth was not ascertained, and the proceeding was not justly determined. The factors that account for this denial of due process can be summarized as follows: (1.) the Fifth Circuit exceeded its authority by amending Fed. R. Evid. 801 to create exceptions not found in the Rule; (2.) the Fifth Circuit

justified its conclusion by relying upon pre-Rules common law rather than Rule 801; (3.) the Fifth Circuit modified the burden of proof and persuasion to Petitioners' detriment; (4.) Petitioners were deprived of relevant original evidence; and (5.) Petitioners were deprived of relevant impeachment evidence.

In short, Petitioners were deprived of their judgment because the law and the facts were changed on them. Serious due process considerations have been violated that affect not only Petitioners but thousands similarly situated.

Respondents' second argument is short-sighted. Congress cannot solve this case or the others in the judicial system. Congress declared its policy when the rules of evidence were enacted. It is now the task of the judicial system to enforce that law. The number of cases pending is a problem, but the problem is aggravated when litigants in Petitioners' position must litigate factual situations having no basis in fact. Issues such as "state of the art" and the pathogenesis of asbestos-related diseases are but examples.

E. The Court Of Appeals Exceeded Its Power And In The Process Denied Petitioners Due Process

Petitioners agree with Respondents that the evidence in question "either are or are not admissible" (Brief 27) with one clarification. They are admissible or not under the Federal Rules of Evidence as written. The Fifth Circuit had no authority to create exceptions to justify exclusion of the evidence. That is the crux of Petitioners' case – their case was not judged according to law. The Fifth Circuit exceeded its authority. The decision is clearly wrong and Petitioners have been harmed.

The law of the case doctrine has no place in this case. In a contest between Petitioners' rights to due process – to have their case judged according to the law – and the

expediency of judicial finality, due process should prevail.

CONCLUSION

Respondents have failed to offer valid reasons for this Court to decline Petitioners' request for relief. The court of appeals departed from the accepted and usual course of judicial proceedings to an extent to call for the exercise of the Supreme Court's power of supervision. Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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FIBREBOARD

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FOR RELEASE 8:00 am EST

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FIBREBOARD ANNOUNCES FAVORABLE INSURANCE SETTLEMENT. QUANTIFIES ASBESTOS LIABILITY AND REPORTS 1991 YEAR-END RESULTS

(CONCORD, CALIFORNIA, March 30, 1992) – Fibreboard Corporation (AMEX:FBD) announced today a favorable insurance settlement with Pacific Indemnity, its 1991 full year and fourth quarter results and quantification of its asbestos liability through the end of the decade.

PACIFIC INDEMNITY SETTLEMENT

Fibreboard announced today a settlement with Pacific Indemnity Insurance Company which could provide up to $360 million for asbestos-related costs. Fibreboard received an immediate $10 million payment plus a provision for an additional $20 million to meet asbestos expenses until the final resolution of insurance coverage litigation against Pacific and Continental Casualty Insurance Company. The agreement provides additional funds of up to $330 million dependent upon certain final court decisions.

Fibreboard Chairman, John Roach, said, "This favorable development for Fibreboard accomplishes two

objectives. First, it solves the short-term asbestos-related liquidity problem we previously disclosed. Second, assuming Fibreboard ultimately wins the insurance coverage appeal, which we believe is likely, Fibreboard will have virtually unlimited insurance coverage from Continental Casualty for pre-1959 personal injury asbestos claims and substantial amounts from this Pacific settlement to fund post-1959 claims." Roach added that a reversal of certain trial court judgments would relieve Pacific from any settlement responsibilities and Fibreboard would be responsible for repaying advanced interim funds. Further details of the Pacific Settlement follow.

* * *

all before general corporate and net interest expenses.

Roach went on to say, "All of Fibreboard's core businesses are cyclical, but are driven by different elements of the economy. Consequently, we cannot assume that all of our businesses would achieve their potential simultaneously. We therefore believe that the company, on a consolidated basis, has the potential within three years to achieve $15 to $20 million in pre-tax income."

The company cautioned that the earnings potential of its core business is based on conditions and assumptions affecting each of the businesses as described in its 1991 Form 10-K. Therefore, there can be no assurance that the potentials can or will be achieved.

ASBESTOS PERSONAL INJURY COSTS THROUGH 1999

Fibreboard has attempted to quantify its asbestos-related liabilities for existing claims and those reasonably anticipated through the end of the decade as well as its insurance resources available to satisfy those liabilities. While there are many uncertainties in such a process and significant risk of error exists, Fibreboard currently estimates such liabilities at $1.610 billion. Fibreboard believes it will ultimately receive insurance resources of $1.584 billion, resulting in a $26 million net liability. Since Fibreboard had $6 million of remaining asbestos reserves for unreimbursable costs, 1991 operating income was charged an additional $20 million to increase the reserve to a level the Company currently believes will be sufficient to cover unreimbursable asbestos related expenses to the end of the decade.

The quantification does not include personal injury claims likely to be received by Fibreboard after the end of the decade. Nor does it include asbestos-in-buildings claims which Fibreboard does not believe can be quantified at this time.

ACCOUNTING TREATMENT

Fibreboard has recorded as a liability the settlement amounts for claims resolved under its Insurance Assignment Program, even though the settling claimants agree to look to Continental Casualty for payment of the settlement. The amount of settlements under this program was $246.8 million at December 31, 1991. Fibreboard has recorded a corresponding increase in assets as it expects Continental will ultimately be required to satisfy these

settlements. In addition, Fibreboard has recorded as a liability amounts still to be paid under its Structured Settlement Program. Consequently, Fibreboard's total assets and liabilities increased significantly from year to year. Fibreboard expects total assets and liabilities will continue to increase in the future as further settlements are made under these programs and are

* * *